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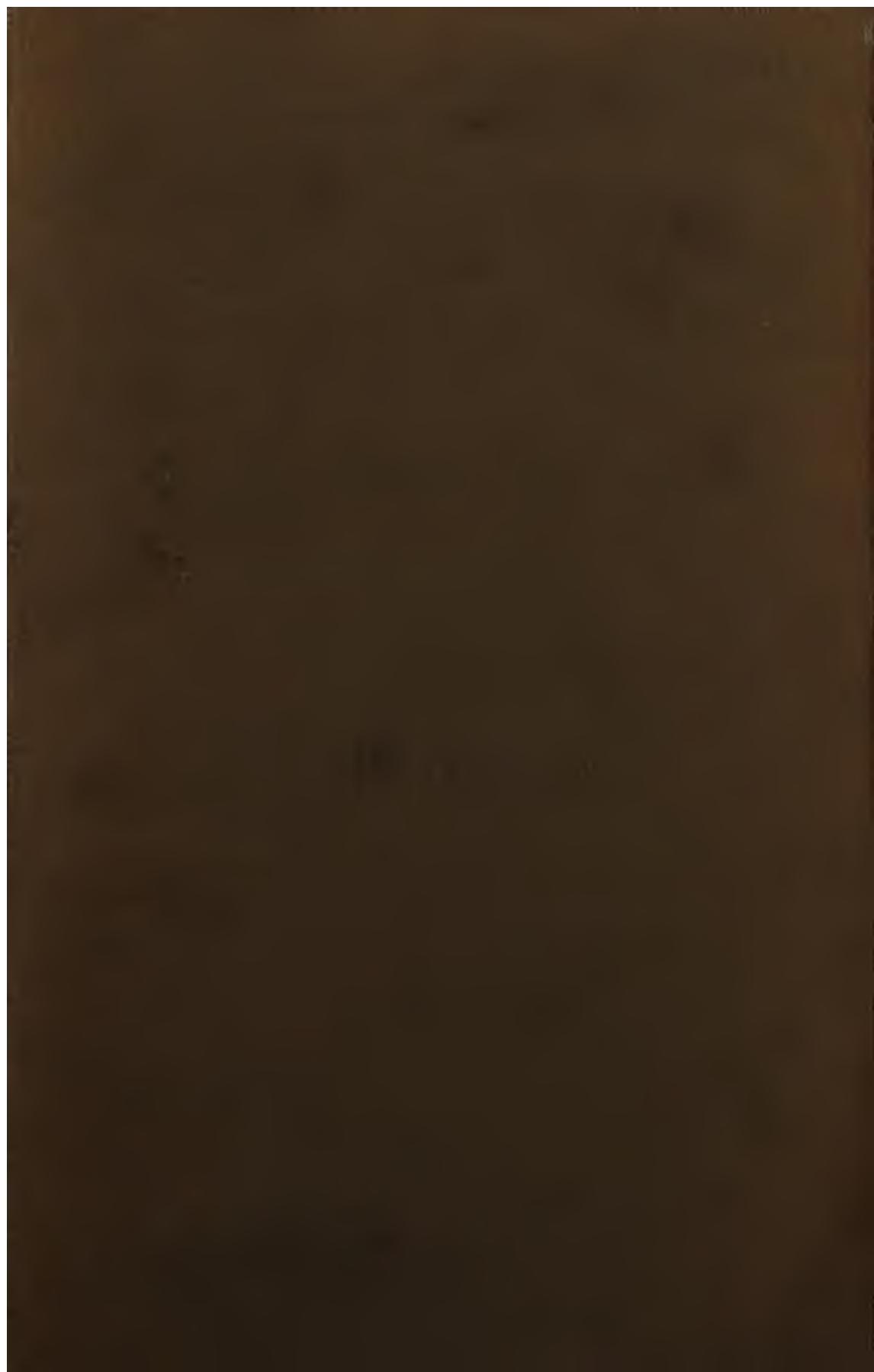
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF CHANCERY
OF THE
STATE OF NEW YORK.

~~~~~  
**By ALONZO C. PAIGE,**  
COUNSELLOR AT LAW.  
~~~~~

SECOND EDITION,
With Notes and References,
By THOMAS W. WATERMAN,
COUNSELLOR AT LAW.

VOLUME II.

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CHANCELLOR
AND
VICE CHANCELLORS
OF THE
STATE OF NEW YORK,

DURING THE TIME OF THE FOLLOWING REPORTS.

~~~~~  
**REUBEN H. WALWORTH, CHANCELLOR.**  
~~~~~

VICE CHANCELLORS:

FIRST CIRCUIT,
OGDEN EDWARDS.*

SECOND CIRCUIT,
JAMES EMOTT.†

THIRD CIRCUIT,
JAMES VANDERPOEL.‡

FOURTH CIRCUIT,
ESEK COWEN.

FIFTH CIRCUIT,
NATHAN WILLIAMS.

SIXTH CIRCUIT,
SAMUEL NELSON.§

SEVENTH CIRCUIT,
DANIEL MOSELY.

EIGHTH CIRCUIT,
ADDISON GARDNER.

* WILLIAM T. MCCOWN, Esq., counsellor at law, was appointed vice chancellor of the first circuit on the 18th of March, 1831, pursuant to a statute authorizing such an appointment, and entered upon the duties of his office on the first of May thereafter.

† CHARLES H. RUGGLES, counsellor at law, was appointed judge of the second circuit on the 15th of March, 1831, in the place of the Hon. James Emott, whose constitutional term of office had expired.

‡ JAMES VANDERPOEL, counsellor at law, was appointed judge of the third circuit on the 12th day of January, in the place of the Hon. William A. Duer, who resigned his office on receiving the appointment of President of Columbia College, in the city of New York.

§ ROBERT MONKELL, counsellor at law, was appointed judge of the sixth circuit on the 2d of March, 1831, in the place of the Hon. Samuel Nelson, appointed one of the justices of the supreme court.

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CASES IN CHANCERY.

COLLINS v. COLLINS.

Where the husband and wife are living together pending a suit for a divorce a mensa et thoro, and the wife is in no danger from personal violence, the court will not break up the family by placing the children under the exclusive control of either party.

If the wife is entitled to the income of property bequeathed to her separate use during coverture, and the husband obtains possession of it for the purposes of the trust, he will be decreed to pay to her the income.

THIS was a bill filed for a divorce a mensa et thoro. 1829, Nov. 17

J. Radcliff, on the part of the complainant, moved for an order requiring the defendant to allow her a reasonable sum for counsel fees to enable her to carry on this suit, and also a suitable maintenance pendente lite; and that the complainant be permitted to receive to her own use the income of her separate estate, and that she also have the custody of the children. Mr. Radcliff cited, in support of the motion, *Dumond v. Magee*, (4 John. Ch. R. 318;) *Turell v. Turell*, (2 id. 391;) *Havaland v. Myers*, (6 id. 25;) *Denton v. Denton*, (1 id. 364;) *Bedell v. Bedell*, (1 id. 604;) *Barrere v. Barrere*, (4 id. 187.)

J. Hoyt opposed the motion, and read the answer of defendant, in which the charges of ill usage contained in

1829. — the bill were fully denied ; he also read an affidavit which
 Collins stated that since the commencement of this suit the com-
 v. plainant had voluntarily accompanied the defendant on a
 Collins journey of pleasure, during which time she had cohabited
 with him. Mr. Hoyt admitted the right of the complain-
 ant to an allowance for a counsel fee if she insisted upon
 proceeding with the suit, but denied her right, under the
 circumstances, to any other allowance. He cited *Denton*
v. Denton, (1 John. Ch. R. 364.)

[*10] *THE CHANCELLOR. The allegations of ill usage made
 by the complainant are denied by the defendant ; and to
 show that the complainant is under no necessity of a sep-
 arate maintanance for herself and children pending the
 litigation, the defendant states that since the filing of the
 bill in this cause she has voluntarily accompanied him on
 a jaunt of pleasure to Albany and the Springs, during
 which time they cohabited together. Under such cir-
 cumstances it is to be regretted that this family difficulty
 cannot be compromised, as well for the interest of both
 parties as on account of their children. There is nothing
 in the facts before me that can authorize the making of
 an order which will tend to widen the breach or to break
 up the family, by separating either the father or mother
 from the children. It is admitted by the defendant's coun-
 sel that the complainant is entitled to a reasonable sum to
 enable her to carry on this suit, if she insists upon going
 on with it. The case of *Pritchard v. Ames and Pritch-*
ard, (Turner's R. 222,) shows that in the end she will be
 entitled to the income for life of the property in the hands
 of her husband, which was bequeathed by her father to
 her separate use for life, with remainder to her children.
 The husband has been in the habit of allowing her interest
 on this sum in quarterly payments of one hundred dol-
 lars each up to the first of May last, since which time it
 has been suspended. It is said the fund is invested in
 real estate which is unproductive ; if so the wife will be

entitled to have it sold, and to have the amount invested for her separate use for life, agreeably to the bequest of her father. If the husband consents to allow her the interest as heretofore, I do not think it proper to make any other order as to the separate estate pending this litigation. If he is unwilling to do this, the real estate in which her property is invested must be sold, and the money brought into the assistant-register's office and invested, to abide the final decree in this cause; and in the mean time she must have the income thereof.[1] The defendant must also advance to her or her solicitor two hundred dollars for the purpose of enabling her to go on with this suit, if she shall be advised so to do.

1829.

Gardner
v.
Heyer

*GARDNER v. HEYER and others.

[*11]

Where the testator lived and cohabited with M. S. in a house provided and furnished by him, and while so living with her had by her four natural children, one son called John, and three daughters, who were with his knowledge and consent baptized by his name and were educated and acknowledged by him as his children, and who were the only persons ever recognized by him as his children; and by his will the testator gave to his son John \$10,000, payable when he arrived at 24, and to each of his daughters \$3,000, payable at 21; and directed his executors to pay to M. S. \$65 quarter yearly during her life if she remained unmarried and had no more children; and appointed his executors guardians of his children during their minority; it was held that this was a sufficient description of the testator's natural children by M. S. as the legatees intended by him.

[1] Where a husband declared his intention to abandon his wife, to sell all the property he got in marriage, and to carry off the proceeds, the court restrained him and compelled him to convey the property to trustees for the joint use of himself and his wife, together with other proper limitations. *Greenland v. Brown*, 1 Desau, 263.

Where a wife is abandoned by her husband or prevented by his ill treatment from cohabiting with him, the court will lay hold of her property, which may be within its power, for the purpose of providing maintenance for her. *Dumond v. Magee*, 4 John. Ch. Rep. 318.

1829. Wills in favor of natural children are to receive a like construction as those in favor of other persons.
- Gardner v. Hoyer.** As a general rule, a devise to children, without other description, means legitimate children; and if the testator has such children, parol evidence cannot be admitted to show that a different class of persons was intended.
- It is always proper to look into circumstances dehors the will to ascertain whether there are any persons answering the description of the legatees named in the will.
- If there are no such persons, then the situation of the testator's family may be proved to enable the court to ascertain the persons intended by the testator as the objects of his bounty.

December 1st. THE bill in this cause was filed by the brother and heir at law of John Gardner deceased, against the surviving executor and trustee under the will of the latter, and certain persons claiming to be the general legatees named or described in the will. The complainant alleged that the will was obtained by fraud from the testator, at a time when he was wholly incompetent to make a will; and he prayed that the will might be declared void, and be ordered to be delivered up to be cancelled; that the trustees and executor might be directed to deliver up the possession of the real estate to the complainant, and account for the rents and profits of the same, and for the personal estate which had come to his hands. The bill also stated divers acts of mismanagement of the funds by the executors and their agent. On filing the bill an order was obtained to show cause why an injunction should not issue agreeable to the prayer of the bill, and to restrain the surviving executor from interfering with the *estate, or from paying over any part thereof to the supposed legatees under the will, and that in the mean time a temporary injunction issue.

[*12]

W. P. Wood, for the complainant.

W. Kent and *B. Bogardus*, for defendants.

THE CHANCELLOR. The answers and affidavits on the part of the defendants show that neither the solicitor, nor complainant who swore to the truth of the bill, had any foundation for their belief as to the incompetency of the testator, or the fraud in obtaining the will. The injunction cannot be sustained on that ground ; even if the court had the power to set aside the will as to the personal estate after it had been proved in ample form before the surrogate and after the complainant who contested it there had for a period of ten years neglected to appeal from that decision. But a new ground is now taken, which is, that if the will is valid, the legacies to the natural children of the testator are void because there is no sufficient description of the legatees who were intended by the testator. It probably would be a sufficient answer to this objection, that no foundation for relief on that ground is laid in the bill. If the allegations in this bill are true, there never was any valid will ; and there is nothing in the bill to show that the complainant makes any claim, as the party beneficially interested under the will, in consequence of the insufficient description of the legatees. The whole scope of the bill as well as the relief prayed is to set aside the will as absolutely void, in consequence of the incompetency of the testator and the fraud of the defendant. But as the question as to the right of the natural children under this will has been raised and fully argued, it may be proper to look into it for the purpose of saving trouble and expense to the parties in the further proceedings which may take place.

From the facts disclosed it appears that the testator was never married ; but had for a long time lived and cohabited with M. Smith, in a dwelling house owned or provided by him and furnished at his expense ; during which time, between June, 1806, and March, 1815, she had by him five children. All *these children were, with the knowledge and consent of the testator, baptized by his name. One of them died in infancy, and the other four,

1829.

Gardner
v.
Hoyer.

[*13]

1829. a son and three daughters, were by him placed at school
Gardner and acknowledged as his children, and were generally
v. reputed as such by his friends. He died a bachelor, and
Hoyer. these children by M. Smith are the only persons he ever
acknowledged or recognized as his children. By his will
he gave to his son John \$10,000, to be paid to him when
he arrived at the age of 24, the interest in the mean
time to be applied to his maintenance and education.
He also gave to each of his daughters \$3,000, payable at
the age of 21; and the interest in the mean time to be ap-
plied to their education and support. He directed his
executors and trustees, to pay \$65 to M. Smith, quarter
yearly during her life, if she remained single and had no
more children. He devised and bequeathed all the resi-
due of his real and personal estate to his executors and
trustees and the survivor of them in fee, in trust to pay
two-thirds of the income thereof to his son John, and one-
third to his daughters during their lives, with remainder
to their issue. And he gave cross remainders to the sur-
vivors in case any of the children should die without
issue. He also appointed the executors and trustees, or
the survivor of them, guardians of his children during
their minority; and earnestly requested that the utmost
care should be taken of their morals and education. From
the facts which I have stated, it is impossible for me to
doubt that the son and three daughters of M. Smith, the
reputed children of the testator, were the intended objects
of his bounty. And if there is not some unbending rule
of law which makes it the duty of the court to punish the
innocent and unoffending offspring for the sins of their
parents, I do not see how these legatees can be deprived
of the property which was intended to be given them by
the testator. I have looked into the several cases which
were referred to on the argument, and find nothing which
places wills made in favor of natural children on a differ-
ent footing, as to construction, from those made in favor
of other persons. As a general rule a devise to children.

without any other description, *means legitimate children; and if the testator has such children, parol evidence cannot be received to show that a different class of persons was intended. But in this case as in all others, it is proper to look into circumstances, dehors the will, to see whether there are any persons answering the description of the legatees in the legal sense of the term; and if it appears there are no such persons, it is then allowable to prove the situation of the testator's family, to enable the court to ascertain who were intended by the testator as the objects of his bounty. The whole law on this subject was so fully examined by the late Sir Thomas Plumer, in *Beachcroft v. Beachcroft*, (1 Mad. R. 430,) that it would be a waste of time to go over the same ground. The bequest in that case was "£5000 to each of my children; and 6000 sicca rupees to the mother of my children." There was no other description of the legatees in the will. The testator died a bachelor, leaving five natural children by an East Indian woman. It was proved, dehors the will, that he had recognized them as his children, and had sent three of them to England for an education. In that case the legacies were decreed to them.

In the case before me the facts are much stronger to show who were intended. The testator could not have intended legitimate children which he might have by a future marriage; for one of the objects of his bounty is described as his son John, and the others as his daughters. It would require too great a stretch of credulity to suppose the testator not only contemplated a marriage and the birth of issue, but that he also anticipated he should have but one son, who would be named John, and that all the other children of the marriage would be daughters; that he should die before they arrived of age, and that they would all need testamentary guardians. To give such a construction to this will would indeed be reversing the rule that the court should endeavor to ascertain and

1829.

 Gardner
v.
Hayer.

1829. carry into effect the intention of the testator. It would
 Hallett be following a technical principle for no other purpose but
 v. to defeat the manifest intent of the testator.[1]
 Hallett.
 [*15] *There is no doubt as to the legal and equitable rights
 of the children of Mr. Smith under this will. The rule to
 show cause why a general injunction should not issue,
 must be discharged with costs; and the temporary injunc-
 tion must be dissolved.

HALLETT and DAVIS v. HALLETT and others, exec-
 utors, &c.

Where land is devised subject to the payment of legacies, and the devisee dies before payment, the legatees have a specific lien upon the income of the land after his death as well as upon the land itself, and their legacies must be paid out of the same in preference to the creditors and legatees of such devisee.

If the estate and the income which accrued after the death of the devisee should prove insufficient for the payment of the legacies charged thereon, the balance, to the extent of the rents and profits received by the devisee in his life time, will constitute a debt against the residue of his estate, to be paid in a due course of administration.

Where the legatees seek a sale of the estate to satisfy the legacies charged thereon, the devisee or his heirs cannot require them to litigate a claim of third persons which if valid is paramount to the title under the will of the deviser.

In such cases, the right acquired under the will, whatever it may be, must be sold subject to all paramount claims thereon.

The rule that all persons materially interested in the subject matter of the

[1] See *Swinton v. Legare*, 2 McCord's Ch. Rep. 440; *Myers v. Myers*, ib. 256; *Jenkins v. Freyer*, 4 Paige, 47; *McLemore v. Blocher*, Harp. Eq. 272; *Campbell v. Wiggins*, 1 Rice's Eq. Rep. 10; *Coleman v. Holladay*, 6 Munf. 47; *Crow v. Crow*, 1 Leigh, 74; *Armistead v. Dangerfield*, 3 Munf. 20; *Van Hook v. Rogers*, 3 Murphy, 178; *Barnes v. Greuzeback* 1 Edwards, 41; *Ewing's heirs v. Handley's exrs.*, 4 Litt. 349; *Frierson v. Van Boeren*, 7 Yerger, 606.

See Waterman's Am. Ch. Dig. Vol. 2, Tit. LEGACY.

litigation should be made parties to the suit, may be dispensed with when it becomes extremely difficult or inconvenient.

But it cannot be dispensed with where the rights of persons not before the court are so inseparably connected with the claims of the parties litigant that no decree can be made without impairing the rights of the former.

Where there are many persons having claims on a fund, and the shares of a part cannot be determined until the rights of all the others are settled and ascertained, as in the case of residuary legatees, or creditors of an insolvent estate, all must be made parties; or they must have an opportunity of coming in and substantiating their claims before any distribution of the fund can be made.

In such cases, if the fund is in court or under the exclusive control of the parties actually before the court, it will be sufficient for any of the parties having a separate claim upon the fund, to file a bill in behalf of themselves and all others who may elect to come in under the decree.

It seems that one residuary legatee may file a bill in behalf of himself and all others standing in the same situation, and that it is not necessary to make them all actual parties to the suit.

Where a bill is filed by a creditor for the payment of a particular legacy, if the defendant admits a sufficiency of assets, a decree for the payment *may be made without any general account of the estate or notice to other creditors or legatees.

But if it appears by the answer that there is a deficiency of assets, the decree must be for a general account and distribution of the fund among all those who may come in and establish their claims under the decree.

If the complainants do not proceed with due diligence under a general decree for an account, any person coming in under the decree will be permitted to prosecute the suit, and may file a supplemental bill if necessary.

Where separate legacies are charged upon real estate in the hands of the heir or devisee, each legatee has a lien on the estate, which cannot be diverted by a sale under a decree to which he is not an actual party. In such cases one legatee cannot file a bill in behalf of himself and the others, but all must be made parties, either as complainants or defendants.

If the names of any of the legatees cannot be ascertained, or for any other reason it is impossible to bring all the legatees before the court, a decree may be made for the sale of the estate subject to the claims of such legatees; but to dispense with them as parties, a foundation therefor must be laid in the complainant's bill.

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NAOMI DUNBAR, by her will, devised her real and personal estate to her son Abraham S. Hallett, charged with the payment of the legacies given in the will; and she appointed him, together with her son Richard S. Hallett, her executors. Among other legacies, she gave to

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her grandchildren Thomas C. Hallett and Hannah Hallett \$1300 each, with interest from the death of the testatrix; payable when they became of age. The complainant Thomas C. Hallett became of age in 1816, and his sister Hannah in 1818. Hannah Hallett died after she became of age, and the complainant Edna Davis was appointed her administratrix. Abraham S. Hallett proved the will and took possession of the property in 1816, and continued in possession until his death in 1826. The other executor renounced the execution of the will. Part of the legacies charged on the real and personal estate of Naomi Dunbar have been paid, but a considerable portion thereof, including the whole amount due to Thomas C. Hallett and his sister, remains unpaid. A part of the property of the testatrix was a house and lot in Water street in New-York, which was worth about \$800 per annum. Abraham S. Hallett by his will directed his executors, or such of them as should assume the executorship, to sell his real and personal estate and pay his debts, and then to divide the residue among his relations, in the manner therein stated; and he *gave the one sixtieth part of his estate to the complainant Thomas C. Hallett, and appointed the defendants and J. R. Willis his executors. Willis renounced, but the defendants proved the will and took possession of the estate; and have since that time received the rents of the real estate devised to their testator by Mrs. Dunbar.

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The complainants filed their bill in this cause, in behalf of themselves, and all others of the legatees of Mrs. Dunbar who should come in and contribute to the expenses of the suit, against the defendants as executors of Abraham S. Hallett, for the purpose of compelling a satisfaction of the legacies, given by the will of Mrs. Dunbar, out of the estate in their hands. The principal facts in the case were admitted by the defendants; but they alleged that there was a dormant claim against the house and lot in Water street which might affect the title of Mrs. Dunbar, in con-

sequence of which they could not sell it and make a good title to the purchaser; that the debts of Abraham S. Hallett exceeded the amount of his personal estate; that a part of the rents of the real estate had been applied to the payment of the legacies given by the will of Mrs. Dunbar, and other parts thereof had been applied in the administration of the estate of Abraham S. Hallett generally; and that no separate account thereof had been kept. The cause was heard on bill and answer; and the question whether the necessary parties were before the court was then for the first time raised.

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P. Ruggles, for the complainants, cited *Davoue v. Fan-ning*, (4 John. Ch. R. 109;) *Brown v. Rickets*, (3 id. 553.)

W. Slosson, for the defendants, cited *Newman v. Johnson*, (1 Vernon, 45.)

THE CHANCELLOR. There can be no doubt as to the rights of the complainants in this cause; and the only question is, whether the proper parties are before the court to enable me to make a decree which will secure those rights. The property having been devised by Mrs. Dunbar, specially charged with the payment of all the legacies, the legatees are entitled to have the proceeds of the real estate, and the *rents and profits thereof since the death of Abraham S. Hallett, applied for that purpose, in preference to the general debts and the legacies which the executors of the latter are by his will directed to pay out of the proceeds of his estate.[1] The legacies given by the first will constitute a specific lien on that fund. The rents and profits

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[1] As to the payment of legacies generally, see *Marsh v. Hague*, 1 Edwards, 175; *Miller v. Phillips*, 5 Paige, 573; *Johnson v. Mitchell*, 1 Randolph, 209; *Williamson v. Williamson*, 4 Paige, 278; *Patton v. Williams*, 3 Monk 89; *Lepton v. Lepton*, 2 John. Ch. Rep. 428; 3 Desau. 371; *Giesse v. Giesse*, extra, 1 Murphy, 192; *Downman v. Rust*, 6 Randolph, 587; *Hallett v. Hallett*, 2 Paige, 15; *McLachlan v. McLachlan*, 9 Paige, 534; *Powell v. Murray*, 10 Paige, 256; *Dodge v. Manning*, 11 Paige, 334. And see *Waterman's Am. Ch. Dig. Tit. LEGACY*.

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received by Abraham S. Hallett in his life time, and disposed of by him, can no longer be traced and identified. If the real estate and the income thereof since his death are not sufficient to pay the whole amount of these legacies, the residue will constitute a debt against his other estate to be paid in a due course of administration.

The parties claiming under the will of Mrs. Dunbar cannot call upon the heirs of Brewerton to litigate with them their title to the estate under a claim paramount to hers. If the complainants had made them parties for that purpose, they probably would have demurred to the bill. The cases of *Pelham v. Gregory*, (1 Eden's Rep. 522,) and *Devonsher v. Newenham*, (2 Sch. & Lef. 199,) show that such a bill could not be sustained. The property must be sold subject to their rights, whatever they may be.

Who are necessary parties to a suit? is frequently a question of difficulty; and it is impossible to reconcile all the various decisions on this subject, either with established principles or with each other. But there are certain general rules which must serve as a guide to the court on a subject that in some measure depends upon the exercise of a sound discretion. It is a general rule in equity that all persons materially interested in the subject matter of the suit, either as complainants or defendants, ought to be made parties, in order that a complete decree may be made which will bind the rights of all, and prevent a useless multiplication of suits. But to this rule there are many exceptions. It is a rule adopted for the convenient administration of justice, and is dispensed with when it becomes extremely difficult or inconvenient. (*Wendell v. Van Rensselaer*, 1 John Ch. R. 349.) It is on the principle of this exception that the circuit courts of the United States, which are courts of limited jurisdiction with respect to parties, are enabled to exercise equity jurisdiction in many cases where a strict adherence to the rule would *compel the complainants to resort to the state courts. (*Elmendorf v. Taylor, and others*, 10 Wheaton's

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Rep. 152. *Harding v. Handy*, 11 Wheat. R. 103.) But this exception does not extend to those cases where the rights of persons not before the court are so inseparably connected with the claims of the parties litigant, that no decree can be made without materially affecting the rights of the former. (*Mallow v. Hinde*, 12 Wheat. Rep. 193. *Ward v. Arredondo and others*, 1 Pain's Rep. 410. 1 Hopkins' Rep. 213, S. C.) If there are many parties standing in the same situation, as to their rights or claims upon a particular fund, and where the shares of a part cannot be determined until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate or residuary legatees, all the parties interested in the fund must in general be brought before the court, so that there may be but one account, and one decree settling the rights of all. And if it appears on the face of the complainant's bill that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof, to whom the defendants would be bound to render a similar account, the latter may object that all who have a common interest with the complainants are not before the court. In these cases, to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves, and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit, and bear their proportion of the expenses of the litigation. If such parties neglect to come in under the decree, after a reasonable notice to them for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims which they might have had upon the same. But if the rights of such absent parties are known and ascertained by the proceedings in the suit, provision will be made for them in the

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decree. (Anonymous, 9 Price's Rep. 210.) In either case the court will protect the defendants against any further *litigation in respect to the fund. (*Furrell v. Smith*, 2 Bull & Beat. 337.)

In *Brown v. Rickets*, (3 John. Ch. Rep. 553,) Chancellor Kent seems to suppose the case of residuary legatees an exception to the general rule that one claimant of the fund may file a bill in behalf of himself and all others having a common interest; but every reason which could possibly be urged against permitting one residuary legatee to sue for himself and all the others, without making them actual parties, was equally applicable to the case then before him for adjudication. The case of *Parsons v. Neville*, (3 Brown's Ch. Rep. 365,) referred to by him as establishing that principle, was not a case of legatees, but of devisees; and the particular nature or object of the suit is not stated. The dictum of Lord Eldon, in *Cockburn v. Thompson*, (16 Ves. 327,) probably refers to this case; as I can find no decision of Lord Thurlow in which the principle is applied to the case of a suit brought by a residuary legatee of the personal estate, or by one who is entitled to a distributive share thereof as the next of kin. The correctness of the opinion of Chancellor Kent on this particular point is questioned by my immediate predecessor, in the case of *Kettle & wife v. Crary*, (1 Paige's Rep. 418, note.) And in a case before Sir John Leach, in 1822, where the *cestuis que trust* were numerous, he permitted a part to file a bill, in behalf of themselves and the others, against the trustees. (*Manning v. Thesiger*, 1 Sim. & Stu. 106.) In the case of *Davoue v. Fanning*, (4 John. Ch. R. 199,) the complainant made a claim upon the real estate; and the suit was not instituted on behalf of himself and the other residuary legatees. I can see no reason for excepting residuary legatees from the application of the rule, and can find no case in which the question has arisen and where it has been directly decided that a part may not sue in behalf of themselves and the

others. The anonymous case before cited (9 Price, 210) shows that their rights will be protected under the decree whether they come in or not; and from the case of *Farrell v. Smith*, (2 Ball & Beat. 347,) it appears the executors will be protected, under the usual decree for an account and distribution of the fund, if by any accident the *existence of a person having such a right was not known until after the fund had been fully administered. I see no objection to the distribution of the fund on a bill thus framed, which is not equally applicable to a similar distribution under a decree upon a bill filed in behalf of a creditor or ordinary legatee; in which cases it is well settled that the residuary legatees or next of kin need not be made parties to the suit. I apprehend the reason why one creditor, or one legatee who has a specific claim against the estate, may sue in his own name only, and yet that a decree may be made on such bill for a general distribution of the fund, to be this: It does not appear upon the bill that there are not sufficient assets to pay all the creditors or legatees; and therefore no general account and distribution of the fund may be necessary. I understand the rule in that case to be, if the executor admits a sufficiency of assets, there is to be a decree for the payment of the particular debt or legacy, without any general decree for an account. Hence the ordinary prayer in the bill that the defendant may admit assets, or set out an account in his answer; and if he admits assets he is not obliged to set out the account. (Per Sir Thomas Plumer, V. C., Cooper's Rep. 215.) But if by the answer of the defendant it appears there will be a deficiency of assets so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the court will make a decree for the general administration of the estate, and a distribution of the same among the several parties entitled thereto, agreeable to equity. If several suits are depending in favor of different creditors or legatees, the court will order the proceedings in all the

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1829. suits but one to be stayed, and will require the several parties to come in under the decree in such suit, so that only one account of the estate may be necessary. (*Ross v. Crary*, 1 Paige's Rep. 416. *Goate v. Fryer*, 2 Cox's Cas. 201.) But to prevent collusion between the complainant and the executor, if the defendant has not set out an account of the estate in his answer, he will not be permitted to restrain other creditors or legatees from proceeding in their suits, until he has made an affidavit as to the amount of the fund in his hands; which fund he may be required to pay into court. (*Paxton v. *Douglass*, 3 Ves. 518.) And if there is any unnecessary delay in the prosecution of the decree, any person coming in to claim under it may apply for leave to prosecute the same, and may file a supplemental bill if necessary. (*Dixon v. Wyatt*, 4 Mad. Rep. 392. *Edmunds v. Ackland*, 5 Mad. Rep. 31.) In all these cases the proceedings are in rem. And the parties who have the exclusive control of the fund being before the court, the chancellor takes the administration thereof into his own hands, and directs due notice to be given to all parties interested to come in and exhibit their claims and settle their priorities. The court having directed the distribution of the fund and thus deprived the executor or trustee of all control over the same, it will not permit those who have neglected to come in under the decree to proceed in a suit against the executor or party from whose hands the fund has thus been taken for distribution. But as a decree can only bind and be made effectual against property which is under the exclusive control of those actually before the court, a suit cannot be brought by one legatee in behalf of himself and all others whose legacies are charged on the real estate, for a sale thereof. The lien of the other legatees on the land would not be divested by such a proceeding, unless they came in and made themselves parties to the suit; and therefore no good title could be made to a purchaser under the decree. Thus in *Morse v. Sadler*, (1 Cox's Cas. 352,)
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where the estate was devised to the defendant, charged with the payment of a number of legacies to different individuals, and one of the legatees filed a bill in behalf of himself and the others for the purpose of charging the estate in the hands of the devisee, Lord Kenyon decided that all the legatees must be actual parties to the suit; and directed the cause to stand over for that purpose. This case seems to be directly in collision with that of *Brown v. Rickets* before referred to; where Chancellor Kent permitted one legatee whose legacy was charged on the real estate to sue in behalf of himself and the other legatees. But on examination it will be seen that a sale under the decree in the latter case gave a perfect title to the purchaser, discharged of the liens of the other legatees; and leaving them to come in and take their share of the fund under the decree or obtain *nothing; whereas a decree in the first case would only have authorized a sale of the interest of the devisee, discharged of the lien of the complainants' legacy; and the purchaser must have taken it subject to the lien of the other legatees, whose interest could not be affected by the decree. In *Brown v. Rickets*, the estate was devised to the executors, in trust to sell and pay the legacies. They had a perfect right to sell for that purpose, and their vendee would acquire a valid title under the will of the testatrix discharged of all liens. The decree in that case directed the executors to execute the trust, by selling the estate; and the court thus obtained the absolute control of the whole fund, to be distributed under its direction agreeably to equity.

On examination of the case now before me, one part of it appears to come within the principle of the decision in *Morse v. Sadler* and another part within that of *Brown v. Rickets*. The estate was devised to Abraham S. Hallett in fee, charged with the payment of divers legacies. He could not sell the property so as to give a good title to the purchaser; but his vendee would have been bound to see that the legacies were actually discharged out

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of the purchase money. (*Horn v. Horn*, 2 Sim. & Stu. R. 418.) If the devisee was alive and now before the court, it would still be necessary to make all those legatees actual parties to the suit, to enable me to make a valid decree binding their rights. If there was any substantial reason why they could not be made parties, the court, to prevent a failure of justice, might make a decree for a sale of the property subject to their lien. But that cannot be done unless a sufficient foundation for such a decree is contained in the bill; as it would subject the estate to the expense of other suits and the executors to a double account. Whether it will be absolutely necessary to make all the heirs at law as well as the legatees of Abraham S. Hallett parties defendants, must in a great measure depend upon the powers given to the executors under his will; whether they take the legal estate by implication or have a mere authority to sell? And if they have the power to convey the legal estate so as to give a good title to the purchaser; whether the complainants and the other legatees of Mrs. Dunbar are willing *to entrust the sale of the property and the distribution of the funds to them? These are questions not properly before me at this time, as the rights of the several parties and the powers and duties of the executors under the last will are not set forth in the pleadings. There is very little doubt of the right of the complainants to make all these persons parties, whether it is absolutely necessary or not. If the estate is exhausted by an unreasonable refusal of the executors of Hallett to sell the property and pay these legacies, which are clearly the debts of their testator and chargeable thereon, they may be personally charged with the costs which the legatees have been compelled to make.

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The cause must stand over; with liberty to the complainants to amend their bill by making all proper persons parties thereto either as complainants, defendants or otherwise, as they shall be advised. They are also to be at liberty to set forth such other facts relative to the rights

of any of the parties, or the powers and duties of the executors under the last will, or in relation to any other matter, as they may be advised to insert in their bill by way of amendment. And the defendants are at liberty to put in a further answer to such amendments; and the question of costs on such amendments is for the present reserved.

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DUNHAM v. WINANS and DUNHAM.

Where one of two defendants was examined as a witness for the complainant, subject to all just exceptions, and his testimony upon the hearing was rejected upon the ground of interest, and a final decree has been made in the cause, a re-hearing will not be granted to enable the complainant to release the interest of the witness and to re-examine him.

After a decree in the cause, it requires a very special case to justify the court in opening the proofs, even to establish a new fact which a party has neglected through inadvertance to prove.

A new trial or re-hearing is never granted to enable a party to obtain cumulative testimony, or for the purpose of contradicting witnesses examined by the adverse party.

This cause was heard on pleadings and proofs as against the defendant Winans, and a final decree in his favor was made therein in May, 1829. D. R. Dunham, one of the *defendants, had been examined as a witness for the complainant, against his co-defendant, subject to all just exceptions. His testimony was objected to at the hearing upon the ground of interest, and was finally rejected by the chancellor upon that ground. January 7th.

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R. Sedgwick, in behalf of the complainant, now presented a petition for a re-hearing, for the purpose of enabling her to release the defendant D. R. Dunham, and to re-examine him as a witness.[1]

[1] A plaintiff on the record, or in interest, when called to testify under the usury act of 1837, to prove the usury, cannot be compelled to answer

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S. A. Foot, for the defendant Winans.

THE CHANCELLOR. This application is novel in its character and dangerous in principle. The objection to

any question which might form a link in the chain of testimony tending to bring him within the prohibition as to discounting of notes by bank officers, and showing him guilty of an unlawful act. *Henry v. Salina Bank*, 1 Com. 83. A party to the record, though merely a nominal party, is not allowed to testify on the trial of the cause, though he be willing, if objected to by the party in interest. *Benjamin v. Coventry*, 19 Wen. 353. From the necessity and hardship of the case, courts have allowed parties to be a competent witness to prove the loss or destruction of papers preliminary to the introduction of secondary evidence. *Blade v. Noland*, 12 Wen. 173. It is in general true, in actions of tort, that when the plaintiff has closed his case, if no evidence has been produced against any particular defendant, he may be discharged by a verdict in his favor, and then he may be a witness for his co-defendants. *Bates v. Conkling*, 10 Wen. 389. *Schermerhorn v. Schermerhorn*, 1 Wen. 119. *Moore v. Eldred*, 3 Hill, 104, n. a. Otherwise in actions ex contractu and in actions of tort, when there is a joint plea of justification. *Ib. Mills v. Lee*, 4 Hill, 549. Although Ch. J. Gibbs (1 Holt, 275) said, that this was not a matter of right which a party can claim; yet, our supreme court thought otherwise, and reversed the judgment below, for an error on that point. *Van Dusen v. Van Slyck*, 15 J. R. 223. See *Moore v. Eldred*, 3 Hill, 104. One of several makers of a promissory note, discharged as an insolvent debtor, his discharge unimpeached, and himself released from all liability by the joint makers of the note, has no interest in a suit commenced on such note; yet being a party to the record, is incompetent as a witness, although the jury pass upon his liability, and find a verdict in his favor. *Schermerhorn v. Schermerhorn*, 1 Wen. 119. Likewise, where there is a separate verdict in favor of one of several defendants grounded on his discharge as a bankrupt. *Mills v. Lee*, 4 Hill, 549. But, when the maker and endorser of a promissory note were sued under the statute, the maker was admitted to prove the note usurious, not for his own benefit, but for that of the other defendant. *Bloodgood v. Faxon*, 24 Wen. 385. A party to the record cannot be sworn as a witness, if objected to. *Chenango Supervisors v. Birdsall*, 4 Wen. 453. In an assumpsit against two defendants, where one of them is misnamed in the capias, which is returned as to him non est inventus, and the suit is proceeded in against the other defendant, who pleads to issue, the defendant as to whom the misnomer has happened, although nominally not a party to the suit, is not a competent witness for his co-defendant. *Vanhorder v. Striker*, 9 Wen. 286. One of several defendants, in whose favor a verdict is found in a justice's court, is not competent to testify as a witness for the other defendants, on an appeal by

the witness on the ground of interest was distinctly raised and argued by counsel at the hearing, and the decree was not made until nearly two months afterwards. Five months after the final decree, the complainant for the first

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them to the common pleas. *Bates v. Conklin*, 10 Wen. 389. If one of the parties, at the request of the other, is sworn and examined as a witness, the latter cannot, afterward, object to it. *Miller v. Starks*, 13 J. R. 317. In trespass against one, other trespassers on the locus in quo, or in other places the title to which depends on the same question as that to the locus in quo, may be witnesses for the defendant, for the verdict will not be evidence for or against them. *Gould v. James*, 6 Cow. 369. In trespass quare clausum fregit, against three joint trespassers, two are taken and the other returned not found; the one who had not been arrested is a competent witness for the other two. *Stockham v. Jones*, 10 J. R. 21. A party charged as combining with others, in a fraud against which relief is sought, and who, therefore, is made a defendant, but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendant. *M'Donald v. Neilson*, 2 Cow. 139. He comes within the exception to the general rule excluding a witness on account of interest, viz.: that where the interest is contingent or uncertain, the witness is nevertheless competent, and the objection shall be confined to his credibility. *Ib.* Whether a decree can pass against them for costs only, seems to be questionable; but admitting that it may, it is still but a contingent liability. A certain liability for costs is undoubtedly an interest which will render a witness incompetent. *Ib.* A case in *Johnson* is also an authority as to the competency of the witness in the above case. *Bebes v. Bank of New York*, 1 J. R. 556. The objection to a party in the suit being sworn, is not placed on the ground of interest; it arises from considerations of policy. A party to the record cannot be sworn as a witness, if objected to. *Supervisors of Chenango v. Birdeall*, 4 Wen. 453. Ch. J. Thompson says, the want of evidence against a party to entitle him to be a witness, should be so glaring and obvious, as to afford strong grounds of belief that he was arbitrarily made a defendant to prevent his testimony. *Brown v. Howard*, 14 J. R. 122. The court expressed an opinion in a former case, that where the defendants joined in the plea of not guilty, one could not be found guilty and the other not, when they all put themselves on the same terms. *Schermerhorn v. Tripp*, 2 Cai. R. 108. Ch. J. Spencer says, the rule is very artificial, and ought not to be extended to the general issue pleaded jointly. *Ib.* *Higby v. Williams*, 16 J. R. 217. In trespass against several joint defendants, if there be no evidence produced against some of them to implicate them in the trespass, they may be struck off the record, and admitted as witnesses for the other defendants. *Brown v. Howard*, 14 J. R. 119. But where there is any evidence against them, this cannot be done.

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witness is admitted by the counsel who asks for a re-hearing; and I am satisfied that it would be dangerous to open the proofs after a final decree in such a case.

The petition for a re-hearing must therefore be dismissed with costs.

against whom it is intended to be used, the motion will not be granted; but where the suit is against executors of a deceased person on a stale demand, the motion will be granted; and in such case, the court will not be astute in inquiring into the discrepancies between the testimony given and that offered to be produced on the second trial, but will leave the credibility of the witnesses to be passed upon by the jury. *Ib.* Application for a new trial on account of newly discovered evidence considered. *Porter v. Talcott*, 1 Cow. 359. New trial granted in ejectment for land in the military tract, on the ground of newly discovered evidence; though this was cumulative merely, and tended to impeach a witness sworn at the first trial. Ejectment for military lots are, in this respect, an exception to the general rule. *Jackson v. Hooker*, 5 Cow. 207. It is against the general rule to grant a new trial, merely for the discovery of cumulative facts and circumstances relating to the same matter, which was principally controverted upon the former trial. It is the duty of the parties to come prepared upon the principal point, and new trials would be endless, if every additional circumstance, bearing on the fact in litigation, was a cause for a new trial. *Smith v. Brush*, 8 J. R. 84. *Steinback v. Col. Ins. Co.*, 2 Cai. R. 129. *Pike v. Evans*, 15 J. R. 210. The judge at the trial has a discretion in respect to the admission of evidence out of the regular and usual course. Thus, after the defendant's counsel had summed up, and while the counsel for the plaintiff were speaking, the counsel for the defendant informed the judge, that he had just discovered from a paper in the possession of one of the plaintiff's witnesses, that the money, &c. was not in fact received, &c.; and asked leave to give that in evidence, and upon the judge's refusal the court granted a new trial, with costs to abide the event of the suit. *Mercer v. Sayre*, 7 J. R. 306. On a motion for a new trial, on the ground of newly discovered evidence, a case of what transpired on the trial must be presented. *Asen*, 7 Wen. 331. A party who asks for a new trial on the ground of newly discovered evidence is chargeable with laches, if previous to the trial he knew that the witness, whose testimony he seeks to introduce as newly discovered, must probably from his situation and employment at the time of the transaction, the subject of the controversy, be conversant with the facts in relation to the transaction, and especially where previous to the trial the party knew, as the witness himself testifies, what the witness could testify to, although at the time of the trial, and while preparing therefor, the party had forgotten what the witness could testify to. *The People ex rel. Osricks v. Superior Court of New York*, 10 Wen. 285.

which I arrived upon the hearing was that even with the testimony of this witness the result of the case would not be altered. It is not necessary now to examine as to the correctness of that conclusion, as the incompetency of the

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And the counsel having moved the matter as a non-enumerated motion, the papers were returned without farther consideration. *Amos*, 2 Cow. 364. A new trial will not be granted, even in a criminal case, because the district attorney, by mistake, withholds in his hands papers important to the defendant, unless the latter uses due diligence to obtain them. Where the district attorney told him, by mistake, they were in the hands of C., who, on being applied to, answered they were with the district attorney; but the defendant did not explain the mistake, and apply to the district attorney again; held, a want of due diligence. *The People v. Vermilyea*, 7 Cow. 369. A new trial will not be granted, on motion of a defendant convicted in a criminal case, on the ground that a co-defendant tried at the same time, and acquitted, was a material witness for the convicted defendant. *Ib.* Such testimony is not newly discovered, though the acquitted defendant is now, for the first time, competent as a witness. *Ib.* A new trial will not be granted, on the ground of newly discovered evidence, when that evidence is merely cumulative. *Whitbeck v. Whitbeck*, 9 Cow. 266. The law will not allow a new trial to the defendant, merely to afford him an opportunity to prove the plaintiff a felon. Such an indulgence would not have been granted to the people, if the party so charged had been once tried and acquitted. *Beers v. Root*, 9 J. R. 264. If the defendant had discovered new evidence which went to the plea of not guilty and that only, it would have altered the case. *Ib.* Neither will a new trial be granted to impeach witnesses who testified on the former trial. *Halsey v. Watson*, 1 Cal. R. 24. *Shumway v. Fowler*, 4 J. R. 425. *Duryee v. Dennison*, 5 J. R. 248. *Brown v. Hoyt*, 3 J. R. 255. *Jackson ex dem. Rowley v. Kinney*, 14 J. R. 186. See *The People v. The Superior Court of New York*, 10 Wen. 285. A party moving for a new trial upon the ground of newly discovered evidence, is bound to produce the affidavit of the witness, from whom such evidence was to come, setting forth the facts, or show that such affidavit could not be obtained. *Denn v. Morrel*, 1 Hall, 382. Where the evidence is strictly cumulative, it cannot be the ground of granting a new trial. *Wheelwright v. Beers*, 2 Hall, 391. It cannot be objected to the granting of a new trial on the ground of newly discovered evidence that such evidence is cumulative, if the evidence alleged to be newly discovered is of a different kind and character from that adduced on the trial; as where the evidence on the trial is wholly circumstantial, and the evidence newly discovered is positive and direct. *Guilot v. Butts*, 4 Wen. 579. In ordinary cases, where the newly discovered testimony consists of admissions made by the party

1880. time offers to release the witness, and asks to set aside
 Dunham the decree and open the proofs in the cause, so that he
 v. may be re-examined. The object of this testimony is to
 Winans support that of another witness for the complainant, and
 to contradict the positive answer of the defendant Winans
 and the evidence of a witness examined on his part.
 After a decree in the cause, it must be a very special case
 which will justify the court in opening the proofs, even
 to establish a new fact which a party has neglected to
 prove through inadvertence; but a new trial or a re-
 hearing is never granted to enable a party to obtain
 cumulative testimony, or to contradict the witnesses ex-
 amined by the adverse party.[1] The conclusion at

[1] A new trial will not be granted on the ground of newly discovered evidence, which is only material to impeach or contradict witnesses who were sworn at the trial. *Harrington v. Bigelow*, 2 Denio, 109. The granting or refusing of a new trial on the ground of newly discovered evidence, is not a matter of discretion, where it clearly appears that the party applying for the new trial was guilty of gross negligence in not procuring on the trial such evidence, and it is exclusively cumulative. *The People v. Superior Court of New York*, 5 Wen. 114. In order to obtain a new trial, on the ground of newly discovered evidence, it ought to appear that the testimony has been discovered since the last trial, or that no laches is imputable to the party, and that the testimony is material; if the party had known of the existence of the testimony, and could not procure it in time, he ought to have applied to postpone the former trial. *Vandervoort v. Smith*, 2 Cai. R. 155. *Hollingsworth v. Napier*, 3 Cai. R. 182. *Palmer v. Mulligan*, 1b. 307. See 15 J. R. 293, 18 J. R. 489. There are certain principles which must be considered settled. 1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence in the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative. *The People v. The Superior Court of New York*, 10 Wen. 292. A want of recollection of a fact, which by due attention might have been remembered, cannot be a reasonable ground for granting a new trial: for want of recollection may always be pretended, and may be hard to be disproved. *Bond v. Cutler*, 7 Mass. R. 207. 1b. Where a motion for a new trial is founded both upon irregularity and newly discovered evidence, it is an enumerated motion. *Anonymous*, 2 Cow. 586. *Remsen v. Isaacs*, 1 Cai. R. 22. *Foden v. Sharp*, 4 J. R. 183

1890.

Dyckman
v.
Kernochan

*DYCKMAN AND McCHAIN v. KERNOCHAN AND OTHERS.

An original bill cannot be sustained either by the parties or privies to a former suit for an injunction to restrain proceedings under a decree in such suit.

An officer out of court has no right to allow an injunction to stay the proceedings under a decree in such a case.

Where an order to stay the proceedings in a cause pending in this court is proper, the party must apply to the court upon petition.

THE bill was filed in this cause to set aside a decree ob- January 28th. tained by the defendants in this court against divers persons who are not parties to the suit, and to restrain the present defendants from carrying that decree into effect, upon the ground that one of the former defendants died before the decree. The master having allowed an injunction for that purpose,

B. F. Butler, for the defendants, now moved that the same be dissolved; upon the ground that there was no equity in the complainants' bill to sustain the injunction.

E. Livingston, for the complainants.

THE CHANCELLOR. The present complainants do not show such an interest in the mortgaged premises as will authorize them to interfere with the decree in the former suit. Dyckman became the purchaser, pendente lite, of all the interest of G. McChain in the mortgaged premises; but it does not appear that either he or S. S. Seymour, under whom he claimed, ever had any interest in the premises decreed to be sold. Even if an interest existed in G. McChain or his grantee, which rendered the decree irregular as against that right after the death of the former, the assignee has not pursued the proper course to correct the irregularity. This is not a bill of review, and it is not the practice of this court to permit an injunction bill to be

1880. filed, either by parties or privies to the proceedings in a
 Larkin former suit, to restrain proceedings under the decree.
 v. The court can control its own process and the proceedings
 Mann. of its own officers, without an original bill being filed for
 [*27] that purpose.

*The master went beyond his authority in allowing an injunction to restrain the defendants from carrying into effect a decree of this court. If any order was proper, the present complainants should have applied by a petition to the Chancellor. The injunction must be dissolved, with costs.

LARKIN v. MANN AND OTHERS.

Where partition suits were pending at the time the revised statutes went into operation, the subsequent proceedings therein must conform to such statutes.

Partition suits in this court may be commenced either by bill or petition, and the course of practice prescribed by the revised statutes in relation to proceedings in the common law courts must be adopted here, as far as is practicable, except in cases where a different course of practice is authorized or prescribed by law.

If the suit is commenced in this court by bill, the complainant must take out and serve a subpoena as in ordinary suits.

No proceedings can be had against an infant after service of the subpoena, until a guardian had been appointed and has filed the requisite security.

Where the right of the complainant is not admitted by the answer, he is bound to make such proof of his title as would entitle him to a recovery in ejectment.

If the bill is taken as confessed, the proof of the complainant's title may be made before a master, on a reference. But if an issue of fact is joined in the cause, the complainant may make the necessary proof, and produce the abstract of the conveyances, before the examiner.

The court may in its discretion award a feigned issue to try the question of title, as in ordinary cases in this court.

In chancery it is not necessary that the shares assigned to the several parties should be exactly equal; as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who receive less.

Feb. 1st. THE bill in this cause was filed previous to the first day

of January, 1830, for the partition of lands, in the county of Schoharie. The bill, having been taken as confessed against all the defendants, was set down for a final decree at the present term.

1830.
Larkin
v.
Mann.

W. Reynolds, for the complainant, now moved for a decree that partition be made, and that commissioners be appointed for that purpose.

*THE CHANCELLOR. By the 22d section of the title of the revised statutes relative to the partition of lands, (2 R. S. 320,) if the default of any of the defendants, whether known or unknown, has been entered, the court is directed to require proof of the complainant's title and an abstract of the conveyances by which the same is held; and all proceedings in partition suits which were pending on the first of January last, or commenced afterwards, must be conducted according to the provisions of that title. Although most of those provisions relate particularly to proceedings in the common law courts, the same course of practice must be adopted here, so far as those provisions can be carried into effect in the ordinary course of proceeding in this court, except in the special cases provided for in the eighty-first section. (2 R. S. 329, § 80, 81.) The suit in this court may be commenced by bill or petition, either of which must contain the requisites prescribed in the fifth section of that title, and must conform to the 174th rule of this court; and if any of the parties are infants, guardians must be appointed and give bonds, as directed in the fourth section. If the complainant proceeds by petition, it may be served or notice thereof may be published in the manner prescribed in the tenth, eleventh and twelfth sections; and if the suit is commenced by filing a bill, he may proceed by subpoena as in ordinary suits in this court. But no proceeding can be had against an infant, after service of the subpoena, until a guardian has been appointed and filed the requisite secu-

[*28]

1830.

Larkin
v.
Mann.

[*29]

urity. If the rights of the several parties as stated in the bill or petition are not admitted by the answers of the defendants, the complainant must make such proof of his title as would be sufficient to enable him to recover in ejectment. If an issue of fact is joined in the cause, it may be determined in the ordinary manner of deciding questions of fact in this court, or the court may award a feigned issue for the trial thereof. If the bill or petition is taken as confessed against all or any of the defendants, the proof of title required by the twenty-second section may be made on a reference to a master for that purpose, if the cause is not heard on pleadings and proofs as against any of the defendants. But in the latter case the *complainant may make proof of his title before the examiner, and produce it with the abstract of the conveyances by which it is held, at the hearing. Where none of the defendants, or a part only, have appeared, and answered and admitted the rights of the several parties as stated in the bill or petition, and the others have made default, the complainant is entitled to a common order of reference under the 177th rule. This order must direct the master to take proof of the title of the complainant in the premises, and of the several matters set forth in the bill or petition; and to ascertain and report particularly what share or part of the premises belongs to each of the parties to the suit, so far as the same can be ascertained, and the nature and extent of their respective estates or interests therein; and that he also report such proof and an abstract of the conveyances by which the title to the premises is held. A further provision may also be inserted in this order when necessary, directing the master, if requested by either of the parties on the reference, to examine and report whether the premises or any part thereof are so circumstanced that a partition thereof cannot be made without great prejudice to the owners thereof; and that he state the particular facts and circumstances, if any, which will render a division of the

property impracticable, or prejudicial to the interests of the several parties.(a)

1830.
Prentice
v.
Achorn.

In proceeding on this branch of the order of reference, it will be the duty of the master to take into consideration that in this court it is not necessary that all the shares should exactly correspond in value; but that one part may be directed by the decree to make compensation to another for equality of partition. (2 R. S. 330, § 83.)

This case must be referred to a master residing in the county of Schoharie to report upon the title, &c., before any further order can be made therein.

*PRENTICE AND OTHERS v. J. ACHORN AND S. MEAD.

[*30]

No person can make a valid contract while he is deprived of his reason by intoxication.

But voluntary drunkenness will not protect a person from liability for torts, or from punishment for crimes committed while in that situation. Where the defendants obtained from the ancestor of the complainants a conveyance of his property, when he was in a state of intoxication, they were charged with the costs of the suit to set aside the deed.

THE complainants filed their bill in this cause to set Feb. 16th. aside a conveyance made by A. Achorn to the defendant Mead of his farm in the county of Chenango, in trust for the defendant Jemima Achorn, who was living with the grantor as his wife at the time of the conveyance. A. Achorn, previous to his death, made his will, by which he gave one fourth of his real and personal estate to the defendant Jemima during the time she remained his widow, and the residue of his estate he gave to his daughters, the complainants, for life, with remainder to their children in fee. The bill alleged that the deed was obtained by fraud and undue influence, at a time when the grantor was in-

(a) Under the first clause of the 78th rule, as amended in April, 1830, a further clause must now be added to this common order, directing the master, if he decides that a sale is necessary, to inquire as to specific liens.

1830.
Prentice
v.
Achorn.

capable of transacting business ; and that Jemima was not his legal wife, she having imposed herself upon him as a widow, and married him while she had a husband still living. The cause was brought to a hearing upon pleadings and proofs, and was submitted on written arguments, when the chancellor ordered a feigned issue to be made up, and tried by a struck jury of the county of Chenango, to ascertain whether the deed was duly executed by Achorn, at a time when he was sober and capable of transacting business, and with a full knowledge on his part of its nature and contents. The jury found a verdict for the complainants on the trial of that issue, and the cause was again set down for a hearing upon the equity reserved.

H. Bleecker, for the complainants.

J. A. Collier, for the defendants.

[*31]

*THE CHANCELLOR. As the trial took place before the new rules were adopted, the court may dispense with the provision requiring a case to be made ; as no evidence was introduced except the written depositions previously before the court. If, upon the depositions before me on the first hearing, there had been such a decided weight of evidence in favor of the defendants as to authorize me now to set aside this verdict on the same testimony, the feigned issue would not have been directed. I consider the testimony as making out a pretty strong case of fraud and imposition on the part of the defendant Jemima ; and in which the character of a public officer, who had certified to the acknowledgment of the deed and had also sworn to its due execution, was deeply implicated. Under such circumstances I was unwilling to make a decree directly in opposition to his official certificate and his oath, without giving the defendants a right to be heard before a jury of the county where he resided. The parties have

chosen by a written stipulation to submit the question to that jury, without any new evidence on either side ; and on this point I can only add, that they have decided in the same manner I should have done had I determined the question of fact without their aid. The deed was fraudulently and improperly obtained from the grantor, at a time when he was by reason of intoxication wholly incompetent to execute a valid conveyance. That a person deprived of his reason in consequence of voluntary intoxication is incapable of making a valid contract, is a proposition too plain to admit of doubt. The law on this subject is ably examined by Judge Prentiss in *Barret v. Buxton*, (2 Aiken's Rep. 167.) Our statute treats intoxication as a species of insanity, which, when it becomes habitual, renders the drunkard an unfit person to be entrusted with the management of his estate. Voluntary drunkenness will not protect a person from liability for torts, or from punishment for crimes committed while in that situation ; but it renders him for the time incapable of exercising reason, without which he cannot make a valid contract. This deed must be set aside, and the defendants must be charged with the costs of this litigation ; and with the rents and profits of the complainants' property, which they have unjustly withheld under the deed.

The defendant Jemima Achorn insists that if the deed is set aside she is entitled to dower in the premises conveyed, and also to the use of an undivided fourth part of the premises, under the will. From the evidence in this case I am satisfied that she had a husband living at the time she married Achorn, in April, 1814. The testimony of the mother and sister of Kelsey, that he was at Catskill about the time and after they had heard of her second marriage, is sufficient to rebut any presumption of death from his previous absence. In addition to this, the defendant Jemima Achorn told her sister-in-law that she had herself seen him after that time. The marriage being illegal and void, she has no claim for her dower in the premises.

1830.
Prentiss
v.
Achorn.

[*32]

1880.

Prentice
v.
Achorn.

The will of Achorn is set out in the complainants' bill, and they do not seek to set it aside on the ground that the testator was incompetent. On the contrary, it is a part of the title under which they claim. Although the defendant Jemima Achorn claims this particular part of the estate in fee under the deed, she does not intend to reject the devise to her by the will. If the conveyance was void, this was a part of the real estate of the testator, in which she took a life estate, determinable on her marriage after his death. Whether he was imposed upon or not at the time of his marriage, it is evident he must have known previous to the execution of the will that her former husband had been heard of since that time. The expressions in the will must be taken in reference to the fact that he knew they were not legally married. He designates her by the title of "my wife Jemima," and gives her the use of one fourth of the property while she remained his widow. It was therefore his intention to give her the property by that name, until she should marry after his death, and for life if she remained single. If, as suggested by the complainants' counsel, she has married since the death of Achorn, her estate under the will is terminated. As that question was not raised by the pleadings, and no evidence has been given in relation to it by either party, the decree must be so framed as not to preclude the parties hereafter *from showing a determination of her estate under the will by a marriage previous to the decree. In the mean time I can only direct an account of the rents and profits and the immediate delivery of the possession of three undivided fourth parts of the premises; leaving the complainants to recover possession of the other fourth, and the mesne profits thereof, in an action of ejectment or otherwise, as they may be advised, if her estate under the will is determined.

[*33]

There must be a decree declaring the deed fraudulent and void; directing a release by the defendants of all right conveyed to them by the same; and perpetually en-

joining them from asserting any right or claim under that conveyance. And a reference to this decree may be entered by the county clerk in the margin of the record of the deed in his office. The decree must also declare that the defendant Jemima was not the lawful wife of Achorn, and is not entitled to dower in his estate; but that she was by virtue of his will entitled to the use of one fourth part of his estate so long as she remained unmarried after his death. It must direct the defendants to deliver to the complainants, immediately on production of a copy of the decree, the peaceable possession of three undivided fourth parts of the premises mentioned in the deed; and that they account to the complainants, before a master in the county of Chenango, for the rents and profits which they have received or might have received for the use of three fourths of the premises since the death of Achorn, and for all damage or waste which they have done or suffered to be done to the premises, and that the master allow interest as shall be equitable; and that on the coming in and confirmation of the master's report, the defendants pay to the complainants or their solicitor the amount reported due, with their costs of this suit to be taxed, and that they be at liberty to enforce this decree by execution. The decree is to be without prejudice to the right of the complainants to sue for a recovery of the other undivided fourth of the premises, and the mesne profits thereof, as they may be hereafter advised.

1830.
In the matter
of Cooper

*IN THE MATTER OF COOPER AND WIFE, INFANTS.

[*84]

Where the guardian entered into a speculation with the husband of his ward, who was also an infant, in relation to her estate, and obtained a mortgage thereon from both, the court removed the guardian from his trust, and ordered the mortgage to be delivered up and cancelled. It seems that the insolvency of the guardian and one of his sureties is also a sufficient reason for the removal of the guardian.

This was an application on the part of these infants to Feb. 16th.

1830. remove Thomas E. Drake from the guardianship of the
 In the matter wife, upon the alleged grounds of insolvency and misconduct. From the report of the master, to whom it was referred to ascertain the facts, it appeared that the guardian of the wife had sold an establishment for the manufactory of band-boxes to the husband, who was an infant, and had obtained from him and his wife a mortgage on her property to secure the payment of the purchase money; and it also appeared from the report of the master that the guardian was irresponsible, and that one of his sureties was insolvent.

J. Rhoades, for the petitioners.

H. Bleecker, for the guardian.

THE CHANCELLOR. The application to remove the guardian from his trust must be granted. It appears from the testimony taken before the master, that there is a serious difficulty existing between the guardian and the husband of his ward, arising out of the improper conduct of the former, in trading with the husband, who was also an infant, and appropriating the wife's property to carry into effect those speculations. The present controversy is the necessary result of such a violation of duty by the guardian, and might reasonably have been anticipated. If he did not know his duty, he ought never to have been appointed guardian; and if he has wilfully violated it, he ought to be removed. The fact of his own insolvency and that of one of his sureties is also another sufficient reason for his removal from the trust.

[*35]

*Samuel W. Seaton must be appointed the guardian of each of the petitioners, on his executing to each a bond in the usual form, with two sufficient sureties to be approved by master B. Clark, and in such sum as he shall direct; and on producing a certificate of the register or assistant register of this court that such bond is filed, Drake must

deliver over to the new guardian of the wife, under the direction of the same master, all property in his possession, or under his power or control, belonging to his late ward, and must deliver up and cancel the mortgage which he has taken upon her estate. He must account before the master in relation to the guardianship, and pay over to the new guardian the balance if any which may be found due; and the question of costs on this application is reserved until the coming in of the master's report.

1830.
Marsellis
v.
Thalhimer

MARSELLIS v. THALHIMER AND OTHERS.

An unborn child after conception is to be considered in esse for the purpose of enabling it to take an estate, or for any other purpose which is for the benefit of the child if it should afterwards be born alive.

But, as it respects the rights of others claiming through the child, if it is born dead, or in such an early stage of pregnancy as to be incapable of living, it is to be considered as if it never had been born or conceived.

Where the mother dies before the birth of the child, and the latter is delivered by the cesarean operation, it is considered in existence before its birth for its own benefit to take the estate of the mother by descent, but not for the benefit of the father to enable him to hold as tenant by the curtesy.

Children born within the first six months after conception are presumed to be incapable of living, and therefore cannot take and transmit property by descent unless they actually survive long enough to rebut that presumption.

The party who claims property through the child is bound to establish the fact that it was born alive; and if the child never breathed there is no legal presumption in favor of the fact.

This was an appeal from the sentence and decree of the surrogate of Rensselaer county, on the settlement of the account of the administration of the estate of Gilbert Marsellis deceased. The only question presented for the decision of the surrogate or of this court was whether the appellant, the *widow of the intestate, was entitled to the whole or only one half of the personal estate, under the

Feb. 16th

[*36

1830. *statute of distributions.* At the death of the intestate he had no children, but the proctor for the appellant insisted that she was entitled to the whole estate; to one third thereof as the widow and to the residue as the mother of a child of which she was enceinte at the time of her husband's death. From the testimony before the surrogate, it appeared that about two months after the death of her husband the appellant was delivered of a full-grown child, which never breathed. No proper means were used to resuscitate the child, so as to enable medical men to determine whether it could have been resuscitated after its birth.

Marcellis
v.
Thalhimer.

J. D. Willard and *S. C. Huntington*, for the appellant, contended that the child having been born, the presumption was that it was born alive until the contrary was proved, and that the onus probandi in this respect lay upon the appellees; that the weight of testimony establishes the fact that the child was born alive; that a child in ventre sa mere was a life in being to all intents and purposes, either as it regarded its own benefit or that of other persons, except in the case of a descent at common law. In support of these positions the counsel cited *Thelsson v. Woodford*, 4 Ves. 227, 293, 4, 5, 6, 7, 308, and the cases referred to in note 1 to that case, p. 227; the opinion of Justice Buller at p. 322, 3 and 4; the opinion of the master of the rolls at p. 334, 5 and 6; and Toller's *Law of Executors*, 31,300.

Lansing and *Frothingham*, for the appellees. The appellant, in order to recover the whole of the personal estate, must show the birth of an heir capable of inheriting. To enable a child to inherit, it is necessary that it should be born alive, and proved so to be born alive; for mortuus exitus non est exitus. (1 Beck's *Medical Jurisprudence*, 175.) The proof necessary to establish this fact is clearly laid down in the cases of tenant by the curtesy

where, to enable the tenant to take, it must be proved that the child was heard to cry, and that by those who actually heard it, and not by those who learned it by hearsay. (1 Cruise on Real *Property, p. 112, tit. 5, ch. 1, s. 20. 2 Black. Comm. 127. 1 Beck's Med. Jurisprudence, 172, 175.)

1830.
Marcellis
v.
Thalhimer.
[*37]

In this case the proof is positive that the child was born dead. Both the women who were present swear positively that the child was born dead; the first, because it was born with its mouth open, and the second, because she did not see it breathe. And the existence of the first of these symptoms and the absence of the other are stated by a very eminent writer on medical jurisprudence as strong evidence of the child's being born dead. (1 Beck's Med. Jurisprudence, 248.) The same writer states that "Still-born infants, or those who die instantly on being delivered, are not unfrequently observed to open their mouth, &c.; may not these be merely the relaxation of a contracted muscle or the stimulus of atmospheric air on a body unaccustomed to it?" &c. (1 Beck's Medical Jurisprudence, 177.)

By the law as it regards a tenant by the curtesy it is necessary that there should be issue born alive, which was capable of inheriting, &c. (1 Beck's Medical Jurisprudence, 175.) It cannot be contended that there is any ground to consider this as a child born alive.

It then becomes necessary to examine, 1. What rights are acquired by a child previous to its birth and while in its mother's womb? A child in ventre sa mere is, for many purposes, supposed in law to be born: it is capable of being a legatee, of receiving the surrender of a copyhold, and it may have a guardian appointed, &c. (1 Black. Comm. 130, n. 9.)

We contend that in all these and the other cases cited from the books, the taking of the child is for its own benefit solely, and on the condition of its being born alive.

Lord Hardwicke, in 2 Atkyns, p. 117 and 118, says:

1830. "The occasion of making the statute of distribution is
 Marsellis stated at large in Edwards and Freeman, and I now take
 v. it to be fully settled that this act is to be construed by the
 Thalheimer. rules of the civil law, &c. ; and as to the civil law, nothing
 is more clear than that this law considered a child in the
 mother's womb absolutely born to all intents and pur-
 poses, for the child's own benefit." The case just cited
 was one under the English statute of distributions, of
 [*38] which ours is a copy. But in *that case the posthumous
 child was herself the complainant, and the reasons as-
 signed show conclusively that it was for her benefit alone
 that she inherited ; for Lord Hardwicke further says : " It
 has been admitted that the debt of nature which the father
 owes, to provide for all his children, will extend to post-
 humous children." (2 id. 116.)

Where is the necessity of a provision for a child born
 dead? "For the civil law for the benefit of the infant
 reputes a child in its mother's womb in the same condi-
 tion as if it were born." (Bacon's Abr. p. 123, tit. Infancy
 and Age, C.) To enable the child after its birth to reap
 the benefit of these principles, it is necessary it should be
 born perfectly alive. (5 T. R. 64, *Grose, J., quotation*
made in Doe ex dem. Lancashire v. Lancashire.)

So by the Roman law, to enable the infant to succeed
 to property, it is necessary that it should be perfectly
 alive. Si vivus perfect est. (1 Beck's Med. Jurispru-
 dence, 174.)

The French Code, 725, 906, cited in Beck's Medical
 Jurisprudence, interprets the words life or being born
 alive as being, according to the most distinguished French
 jurists and physicians, complete and perfect respiration.
 (1 Beck's Med. Jurisprudence, 174.)

Let us now see how the rights of the child are consid-
 ered or what notice is taken of it when born dead. In the
 case of the *King v. De Brouquens*, (14 East's R. 276, 278,) it
 is decided under the bastardy act, that unless the child
 is born alive there is no bastard. Lord Ellenborough, Ch.

J. in that case says, "In order to come under the denomination of a bastard, must not the child be born alive? All the several statutes assume the birth of a child, which of course must be born alive." Grose, J. in the same cause says, "No dead substance is the object of legislative provision in any of the acts."

1830.
Marcellis
v.
Thalheimer.

It may be said that an infant in ventre sa mere takes by descent. It is so. But in that case the presumptive heir may enter and receive the profits for his own use till the birth of the child. (3 Wilson's R. 526.) "Where a person died leaving his wife enceinte, the common law, &c., casts the *freehold upon the person who is then heir. But when the posthumous child is born, his guardian may take possession, &c., and in such a case a posthumous child is not entitled to any profits received before his birth, because the entry of the heir was congeable till the posthumous child was born. (3 Cruise on Real Property, p. 385, tit. 29, ch. 3, § 12.) These are cases relating to real estate, but they clearly show that though the child for its own benefit takes by descent in ventre sa mere, until its birth the inheritance is not vested, but may be taken by the presumptive heir; and if the child is still-born the inheritance never vests.

[*39]

The appellant claims as heir at law.

Possession is the evidence of title to personal property.

Where in this case is the possession of the infant ancestor that will entitle the mother heir to the inheritance? The proviso to the statute of distributions is, "That if after the death of a father any of his children shall die intestate without wife or children," &c.

To entitle the mother as heir, the child must have died, and this proved by legal evidence. How can it be proved to have died without showing that it first lived? and of this there can be no evidence.

The case of *Thelussan v. Woodford*, (4 Vesey, jun. 227,) was strongly relied upon in the court below. That was a case arising upon the construction of a will, and we have

1830. not been able to discover any thing in it that militated
 against the principle contended for by the appellees, that
 a child in ventre sa mere acquires rights for its own
 benefit solely, to become perfect on condition of its being
 born alive.

Marsellis
 v.
 Thalheimer.

The case in East before cited, and decided in A. D. 1811, shows in what light a dead child is viewed in legislative acts.

[*40]

THE CHANCELLOR. It is at this day a well settled rule of law relative to successions, and to most other cases in relation to infants, that a child in ventre sa mere, as to every purpose where it is for the benefit of the child, is to be considered in esse. Thus in *Doe v. Clarke*, (2 Hen. Black. R. 399,) where the devise was to every child of C. which should be living at the time of his death, a posthumous child of C. *was held entitled under the devise. In *Miller v. Turner*, (1 Ves. sen. 85,) a posthumous child was held entitled, under a provision in the marriage articles for every child who should be living at the death of the father. In *Hale v. Hale*, (Prec. in Ch. 50,) *Beale v. Beale*, (1 Peere Wms. 245,) *Northby v. Strang*, (id. 342,) *Burdet v. Hopegood*, (id. 486,) *Rawlins v. Rawlins*, (2 Cox. Ca. 425,) and *Thelusson v. Woodford*, (4 Ves. 227,) the same rule is recognized. In *Trower v. Butts*, (1 Sim. & Stru. R. 181,) Sir John Leach went still further, and held that under a bequest, to all the children of a nephew of the testatrix born in her life time, a child of the nephew in ventre sa mere, at the death of the testatrix, and which was not born for several months after, was included, and was entitled to an equal portion with the other children.

It was for some time doubted whether such a child could take a contingent remainder before its birth. That question was finally settled by the decision of the house of lords, in which Lord Chancellor Somers took the lead against the decisions which had been previously made on this subject by the king's bench and common pleas. It

is now the settled law both in England and here, that the infant after conception, but before its birth, is in esse for the purpose of taking the remainder or any other estate or interest, which is for the benefit of the infant. (*Stedfast v. Nicoll*, 3 Johns. Ca. 18. *Swift v. Duffield*, 5 Serg. & Raw. 38.)

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v.
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The broad and unqualified language which has been used by some of the judges, has induced the appellant's counsel to suppose the unborn child was to be considered in existence for every purpose whatever, whether for its own benefit or that of others. That it may be considered in existence for the benefit of others in some cases, may perhaps be admitted ; as in the case mentioned by Buller, justice, (4 Ves. 323,) of an estate given to a third person during the life of an infant in ventre sa mere. But it must be recollected that the existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive and be capable of enjoying those rights which are thus preserved for it in anticipation. The rule has been derived *from the civil law ; and the constant struggle in the courts has been between that rule and certain principles of the feudal law, which required the heir to be capable of taking an immediate and beneficial interest in the estate. Especially under the statute of distributions must we resort to the civil law for the purpose of determining who are to take under its provisions.

[41*]

Previous to the statute directing the grant of administration to the next of kin, the ordinary was in the habit of distributing the estate according to the rule of the civil law ; but after the making of that statute, the temporal courts held that the administrator was not bound to make distribution of the residue ; and as often as the spiritual courts attempted to compel such distribution, a prohibition was granted. The statute of distributions was therefore a legislative determination of the question in favor of

1830. the civilians. And in *Walles v. Hodson*, (2 Alk. 117,) Lord Hardwicke says, "I now take it to be fully settled that this act is to be construed by the rules of the civil law."
 Marsellis
 v.
 Thalheimer.

Although by the civil law of successions, a posthumous child was entitled to the same rights as those who were born in the life time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. The rules on this subject are found in Domat, in the Napoleon Code and in the Civil Code of Louisiana. Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early state of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth, are considered as if they had never been born or conceived. (Civil Code of Louisiana, art. 28, 29. Code Napoleon, art. 725, 966. Domat Prel. B. tit. 2, § 1, art. 4, 5, 6; pt. 2, lib. 2, tit. 1, § 1, art. 6, 7.) In the article last cited Domat says, "Still-born children are not counted in the number of children who succeeded. And although they were alive in their mother's womb at the time the successions which concerned them fell, yet *they have no share in them; for they are considered in the same manner as if they never had been born." Children born within the first six months after conception, are considered by the civil law as incapable of living; and therefore, although they are apparently born alive, if they do not in fact survive so long as to rebut the presumption of law, they cannot inherit so as to transmit the property to others. (Code Napoleon, art. 312, 725, 906. Code of Louisiana, art. 205. Dig. lib. 38, tit. 16, l. 3, § 12; & lib. 1. tit. 5, l. 12. Domat Prel. B. tit. 2, § 1, art. 5.)

[*42]

I have not been able to find a case in the English or American reports in which the precise question now before me has arisen. The rule of the civil law is however clear and explicit; and as the case must be one of fre-

quent occurrence, the fact that such a claim has not before been made is strongly opposed to the right now insisted on by the appellant. In the analogous case of a tenancy by the curtesy, it is well settled that the child must be born alive in the life time of the mother, to entitle the father to the estate. And even the delivery of the child alive, by the cæsarean operation, after the death of the mother, is not sufficient. In that case, therefore, the rule holds that the unborn child may take the estate for its own benefit, but is not to be considered as in existence for the benefit of another person.

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Marcellis
v.
Thalhimer.

The question as to what is sufficient evidence that a child was born alive, and capable of living, so as to enable it to inherit property and transmit it to others, is ably examined by Doct. Beck, whose work on medical jurisprudence is the best treatise of the kind which has been published in this country or in England. (1 Beck's Med. Jur. 172.) Testing the evidence of what took place at the birth of the child, by the reasoning of Doct. Beck and the opinion of the physician who was examined before the surrogate, I am satisfied that no court is authorized to decide affirmatively that the child was born alive. There is no legal presumption in favor of the fact; and as the mother claimed by descent from the child she held the affirmative and was bound to establish her right by legal proof.

*The decision of the surrogate was therefore correct in awarding one half of the estate to the collateral heirs of the decedent; and his sentence and decree must be affirmed with costs.

[*43]

1880.

Canajoharie
Church
v.
Leiber.

THE CANAJOHARIE AND PALATINE CHURCH v. LEIBER
AND OTHERS.

Where a person contracts with the members of a religious community to convey land as the site of a church, and the society are afterwards regularly incorporated under the act, and the church is built on the premises the court will decree a conveyance of the property to the corporation, according to the agreement previously entered into with the individual members of the society.

But where the person holding the legal estate has expended his own money in building the church previous to the incorporation of the society, the court will not compel him to give up his legal claim to the estate until his equitable claim is satisfied.

In 1818, Leiber and Ehle, two of the defendants, owned a tract of land in the village of Canajoharie, including the church lot in question in this cause. The defendants and divers other persons at that place associated for the purpose of building a church, and Leiber and Ehle agreed to give the lot for that object. Leiber, and Failing the other defendant in this cause, together with three others, were appointed a building committee, and to obtain and collect subscriptions for the church. During the building of the house, Leiber and Failing expended \$667.33 over and above the amount of their subscriptions, which was credited and admitted to be due by the associates on the 5th of June, 1819. In December thereafter the society was incorporated by the name of "The Canajoharie and Palatine Church." Leiber and Failing have frequently since the incorporation applied to the trustees to pay or secure to them the above debt, which the trustees refused to do. Leiber, who considered himself under an equitable obligation to obtain the payment of Failing's share of the debt, conveyed one half of his legal estate in the church lot to him to secure such payment. *Subsequently Leiber became entitled to the whole debt, by assignment from Failing. After repeated ineffectual attempts to obtain either

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payment or security from the corporation, a partition suit between the defendants was commenced in the Montgomery common pleas, and an order for a sale of the premises was obtained in that court. The complainants then filed their bill in this cause to restrain the proceedings in the partition suit, and for a conveyance of the church lot from the defendants to the corporation.

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Canajoharie
Church
v.
Leiber.
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The defendant Ehle made no claim to the premises, and consented to convey his share thereof to the complainants. The other defendants consented to convey their half of the lot upon receiving payment of the debt due them as two of the building committee; and they averred that they had always been ready and willing to make such conveyance upon receiving such payment or security for the same. The cause was heard on pleadings and proofs.

M. T. Reynolds, for the complainants.

• *S. D. Hewlett*, for Leiber and Failing.

THE CHANCELLOR. Although the agreement to convey this lot was made before the society was incorporated, yet in equity the agreement ought to be carried into effect with the corporation, which now represents the rights of the original associates. This principle is recognized in a late case before the supreme court of the United States. (*Beatty v. Kurtz*, 2 Peters' Rep. 566.) The defendants do not deny this equitable principle; but as they have no legal remedy against the complainants for a debt which became due before they were a corporation, they insist it is inequitable that the corporation should have a conveyance of the lot without paying or securing that claim. It is pretty certain that the defendants cannot recover this debt against the corporation in a court of law. The authorized agents of the complainants have never agreed to pay it since they were incorporated, but on the contrary have uniformly refused to do so. I think it is perfectly

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 v.
Hallett.

equitable and just that it should be paid by the corporation, who have had the benefit of the labor and *advances of the defendants. A religious corporation, of all others, should be the last to insist upon a claim so manifestly unjust. The defendants were justified in using their legal title to the property to compel the corporation to do equity; and it would be contrary to the settled principles of this court to give the complainants relief on any other terms.

The defendant Ehle has no claim to retain the legal title to his share of the premises, and must therefore forthwith convey the same to the complainants. The defendants Leiber and Failing must also convey to them the other undivided half of the premises, provided the complainants within six months after this decree pay to Leiber or his solicitor the said debt and interest thereon from the 5th June, 1819, and his costs of this suit and in the partition suit to be ascertained and taxed by one of the vice-chancellors or a taxing master, and also pay to the defendant Failing or his solicitor his costs, to be ascertained and taxed in like manner. If the complainants neglect to pay the said several sums within that time, the undivided half of the property must be sold by a master, and the amount paid out of the proceeds of the sale. And if the proceeds are not sufficient to pay the whole amount of debt and costs, including the costs of this suit, Leiber and Failing are to have execution against any other property of the corporation for the costs of this suit, or for so much thereof as remains unpaid on such sale.

STAFFORD v. BRYAN.

It seems the court of chancery cannot entertain a bill in the nature of a bill of review upon the ground of newly discovered facts, to review a decree which had been affirmed in the court for the correction of errors,

unless such a right has been expressly reserved by the final decree of the appellate court.

1880.

Stafford
v.
Bryan.

To revive a debt barred by the statute of limitations, there must be an admission of a subsisting indebtedness, unaccompanied by any thing which shows the intention of the party to avail himself of the statutes as a bar, or which is sufficient to rebut the implication of a promise to pay.

Where a witness on his cross-examination is interrogated as to matters which are irrelevant and improper, and which cannot benefit either party in the *suit*, the party at whose request such cross-examination was had is chargeable with the examiner's fees for drawing, engrossing and copying such part of the testimony as was useless or irrelevant.

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If the depositions of witnesses are unnecessarily prolix or irrelevant, although the solicitor at whose request they were taken down may be answerable to the examiner for his fees, he cannot be allowed therefor on the taxation of the costs, even as against his own client.

Where there is a general decree for costs against the complainant, he is not chargeable with the extra expense which has been produced by the neglect of the defendant to put in a perfect answer at first.

But the draft and copies of so many folios of the further answer as would have been necessary to make the first answer perfect, or as have been made necessary by subsequent amendments of the bill, are properly taxable.

Only two copies of the bill or answer in addition to the engrossed copy to file are to be allowed on a taxation.

The jurat should be drawn up by the solicitor in the form prescribed by the 18th rule, and charged as part of the folio contained in the bill or answer, and not as a separate affidavit.

Where a party obtains a general decree for costs in the cause, he is entitled to have taxed the costs of a successful interlocutory motion if no direction as to costs was given at the time, unless such application was granted as a mere matter of favor, or to relieve the party from the consequences of his own default.

The party opposing a motion unsuccessfully is not entitled to the costs of opposing, as costs in the cause.

The party making an unsuccessful motion is not entitled to the costs of such motion; but the party opposing the same is entitled to his costs, as costs in the cause, unless a different direction is given at the time.

Under the fee bill in the revised statutes, the solicitor is not entitled to charge by the folio for the draft or copies of his bill of costs.

Bills of costs which are to be annexed to the decree or enrolment must be fairly engrossed, without unnecessary erasures or interlineations, before they are certified by the taxing officer; and if they are not in that situation, he should direct them to be re-engrossed.

AFTER the decision of this cause as reported in 1 Feb 1881.

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 v.
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[*47] Paige's Rep. 239, the complainant appealed to the court for the correction of errors, and the decree of dismissal was affirmed with costs. Pending that appeal the complainant called the defendant as a witness before an examiner, in another cause pending in this court, in which the same note in controversy in this suit was in question between the complainant and third persons. The complainant after such examination applied to the court of errors to stay the hearing in that court until he could apply to this court for leave to file a supplemental bill in the nature of a bill of review; for the purpose *of showing that upon such examination the defendant admitted he had not paid the note. That motion having been denied, and the remittitur, containing the affirmance of the decree of dismissal with costs, being now brought into this court,

J. Lansing, for the complainant, presented a petition for leave to file a supplemental bill in the nature of a bill of review, and that all the proceedings in the mean time be stayed. The complainant also applied for a re-taxation of the costs in this court.

S. Dutcher, junior, for the defendant, objected that this court could not review a decree which had been affirmed on appeal, even upon newly discovered facts. He also insisted that there was no admission of indebtedness in the deposition of the defendant inconsistent with his answer in this cause, or which could authorize a recovery for the note in question. Other objections were also made, which it is not necessary to state.

THE CHANCELLOR. Without examining the question at length, whether this court can in any case entertain a bill of review after the final decree of the court for the correction of errors in the cause, it may be sufficient to say that the case of *Barbon v. Stearle*, (1 Vern. 416,) relied on by

the complainant's counsel, seems to be an authority against such right. The allegations in the bill in that case were, that pending the appeal, as the complainants had since discovered, the defendant had appressed certain evidences and burnt the deed on which the complainant's title depended. And a discovery of these matters was prayed merely in aid of an application which was intended to be made to the house of lords, when it should be in session, for relief there. The complainant in his bill, as well as the counsel on the argument of the demurrer, expressly disavowed any authority in the court of chancery to reverse or alter the order or decree of the house of lords. And the lord chancellor himself appears to have thought he had no such right; for he directed that after the defendant had answered the bill, the complainant should not be permitted to proceed any further without the special leave of the *court. If this court can review, on new evidence, a decree affirmed in the court of dernier resort, it can also review a decree which has been reversed there; but I doubt the authority of the chancellor to do it in either case, unless that court has expressly reserved to him that right. If the facts in this case had been sufficient to authorize such a proceeding, a provision to that effect might have been inserted in the decree of affirmance.

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v.
Bryan.

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But if that decree was not in the way of this application, I think the facts in this case are not sufficient to authorize the filing of a bill of review. If the decision of this court, or that of the court of errors, had turned upon the question whether the note had or had not been paid, I presume the result would have been different, even on the facts as originally presented in the cause. The case turned wholly on the statute of limitations, which was considered by both courts as a legal bar to the suit, whether the note had been ever paid or not. My own opinion certainly was that the note never had been paid; but I did not believe the defendant had acknowledged it as a valid and

1830. — subsisting debt, or had ever offered or promised to pay it
 Stafford within six years previous to the commencement of this
 v. suit. And the same opinion was expressed by several
 Bryan. members of the court which affirmed my decree.

I think the counsel has misunderstood the deposition of the defendant which was made before the examiner, when taken in connection with his original answer. In the answer he stated his belief that the note had been actually paid. If in the further progress of this suit his opinion had been altered on that point, or he had serious doubts on the subject, he could not reiterate the expression of that belief on his examination as a witness, without doing great injustice to one of the parties in that suit. He does not however admit that the note never had been paid; he at most evades giving any direct answer to that inquiry. The language of his deposition, in answer to successive interrogatories which were undoubtedly put to him by the complainant's counsel, is, that he does not know when, where, or to whom the note was paid; but that at all events it is not now a *subsisting demand, being barred by the lapse of time. He refuses to swear that the note has been paid in money. In a subsequent part of the deposition he says he did not know that he was indebted to the firm previous to the death of John Stafford. But this could not be true if he admitted that he at that time knew that the whole amount of this note was an equitable and subsisting demand against him. To take a case out of the statute of limitations, there must not only be an admission of a present subsisting indebtedness, but it must be unaccompanied with any thing which shows the party intends to avail himself of the statute as a bar, or which is sufficient to rebut the implication of a promise to pay. The opinions of Justice Sutherland in this case, before the court of errors, and of Justice Marcy in the case of *Purdy v. Austin*, in the supreme court, (3 Wendell's Rep. 187,) are sound and correct expositions of the law upon this subject. The evils of resorting to

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uncertain and vague declarations of parties to revive debts barred by the statute have been so great and have led to so much perjury that it has recently been found necessary in England to prohibit the introduction of any parol evidence to prove an admission of indebtedness or a promise to pay a debt which is barred by the lapse of time. (Statutes at large, 8 Geo. 4, May 9, 1828.)

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v.
Bryan

I am satisfied the new matters now sought to be brought before this court by the bill of review could not have altered the result if they had been given in evidence on the former hearing. The petition must therefore be dismissed with costs to be taxed against the complainant, and to be included in the same bill with the general costs in the cause; and there must be a decree, in the usual form, to carry into effect the decision of the court of errors as contained in the remittitur. The costs of the proceedings in that court on the appeal, must be taxed separately, but all the costs in this court must be included in one bill, and the taxed costs in both courts must be filed with the register and annexed to the enrolment of the final decree.

On the question of re-taxation which has been made and argued in this cause, I have looked into the bill of costs and the petition and affidavits and find that the counsel fees were properly allowed, except some which were incurred in *relation to proceedings for which the complainant was not answerable, as hereafter mentioned. The charge for the examiner's fees, so far as relates to drawing and copying the direct examination of S. Dutcher, junior, ought not to have been allowed; but the fees for drawing and engrossing the cross-examination are properly chargeable against the complainant. The whole of that was useless and improper, but as it was the act of the complainant's counsel, it is proper that he should pay the examiner's fees of this extraordinary and vexatious cross-examination. There is another objection to this item which ought to have been noticed by the taxing officer. The examiner's bill has been taxed in gross at \$158.25,

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CASES IN CHANCERY.

without specifying for what services the charge is made.
rd The 130th rule requires that the several items of the fees
m. of each officer of the court be particularly detailed and
not charged in gross. The object of this provision is that
it may appear upon the face of every taxed bill that no
officer has been allowed for any improper or illegal
charge. Each item of the examiner's, register's and mas-
ter's bills should be set out at length, with the same par-
ticularity as those of the solicitor and counsel. Although
the party at whose request each witness was sworn and
examined, or each particular exhibit was certified and
marked, may be answerable to the examiner for his fees,
it does not follow of course that it is taxable against the
adverse party, unless it was necessary and relevant. If
the deposition of any witness is unnecessarily prolix or is
irrelevant, the taxing officer is directed to disallow any
charge therefor, even as between the solicitor and his own
client. (R. S. 183, § 101.)

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As the costs in this cause must be referred back to the
master for a re-taxation, it is proper to suggest that he has
allowed numerous items in this bill which ought not to
have been taxed against the complainant, whether object-
ed to or not. By one of the provisions of that title of the
revised statutes which relates to the taxation of costs, (2
R. S. 653, § 5,) it is made the duty of the taxing officer to
examine the bills presented to him, whether the taxation
be opposed or not, and to be satisfied that the items charged
are correct and legal, and to strike out all charges for ser-
vices which were *unnecessary, &c. Although this court
will not as a matter of course allow an appeal from the
decision of the taxing officer, where a party has neglected
to appear or to make the objection before him, yet where
a re-taxation is ordered, if it appears on the face of the
taxed bill that other improper items were allowed, the
taxing officer may be directed to review his taxation as to
those items, although not objected to on the previous taxa-
tion.

If the defendant puts in an insufficient answer, which is excepted to on that ground, if the exceptions are submitted to, or allowed, he has no right to charge the complainant with the additional expense which has been produced by his neglect to put in a sufficient answer in the first instance. The draft and copies of so many additional folios as would have been necessary to render the first answer full and perfect, or as have been produced by subsequent amendments to the bill, are properly taxable. But the charges for perusing and amending, filing, swearing to the further answer and serving the same, and others of a similar description, which would not have been necessary if the first answer had been complete, cannot be taxed against the complainant. The petition for further time to consider the exceptions in this case, and the stipulation or submission to answer further, and several other charges of a similar nature, fall within the same rule. The master has allowed for a draft and three copies of the answers, &c., in addition to the engrossed copy to file; this is one copy more than is taxable by the settled practice of the court, and two more than is usually made. He has also allowed for two folios for the draft and copies of the affidavits of the truth of the answers, petitions, &c.; this is also improper. The jurat to the answer or petition, if properly drawn, cannot contain one folio, and ought not to be drawn in the shape of a separate affidavit. It is the mere certificate of the officer that the defendant or petitioner was sworn to the truth of the answer or petition. It should always be drawn up by the solicitor, in the form prescribed by the 18th rule, and estimated as part of the folio contained in the answer or petition. The charge for attendance before the master on the exceptions, which were finally decided *against the defendant, and all other proceedings in relation thereto which were the necessary result of his imperfect answers, must be disallowed.

The rule as to costs of interlocutory proceedings, in relation to which no directions were given at the time, and

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v.
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 v.
 Bryan.

which are to be allowed as costs in the cause, in favor of the party who obtains a decree for costs, is this : The party making a successful motion, and which is not granted as a mere matter of favor or to relieve him from the consequences of his own default, is entitled to the costs of the motion, as costs in the cause ; but the party opposing such a motion unsuccessfully is not entitled to the costs of opposing, as costs in the cause ; and if a party makes a motion which fails, he is not entitled to his costs, but the party opposing may have his costs as costs in the cause, unless a different direction is given at the time. (1 Sim. & Stu. Rep. 357.)

The master has allowed the defendant's solicitor by the folio for drawing his bill of costs, amounting to \$6.50. The whole of this charge is improper, as no such allowance is made by the fee bill. The solicitor's fees in the Revised Statutes are taken from the act of April 21st, 1818, and the provisions of that act were not intended to be altered by the revisors or the legislature. (Rev. notes to report of ch. 10, pt. 3, p. 31, 32.) It is well known that the fee bill of 1818 was prepared by the late Chancellor Kent, under a resolution of the assembly, with remarks explanatory of each item. The second clause of the present fee bill, which authorizes a charge by the folio for drawing pleadings "and other proceedings in a cause," was not intended to cover the draft of a bill of costs. The fee bill of 1818 had a special provision allowing for such draft by the folio, but it was intended to be excluded by Chancellor Kent's bill, although the second clause was retained as in the bill of 1818 and in that which is now in force. In his report to the assembly, (Journal of February 25, 1818, p. 335,) the late chancellor has appended this remark to the item for copies of the bill of costs : "The allowance in this case is much diminished from the act of 1818, by totally omitting the following charge : 'Drawing costs for taxation, for every ninety words, twenty *cents.'" But it would have been increased in-

stead of diminished if it could have been taxed under the second clause; because the allowance for drawing pleadings and other proceedings was raised to 25 cents in the bill as reported by him. The uniform construction of that fee bill by my predecessors has been against the right here claimed, and in accordance with the intention of the chancellor as expressed in his report. The same construction must therefore continue to be given by this court to like provisions in the Revised Statutes. The charge for drawing and filing a precipe is excluded by the Revised Statutes, (2 R. S. 651, § 11;) and the allowance for interest on the examiner's fees was illegal and improper.

Under the present law the taxed bills of costs are to be annexed and to constitute a part of the enrolment of the decree. They must therefore be carefully engrossed without erasures or interlineations, like other papers filed in the cause; and if they are not in that situation, or if any considerable deductions are allowed on taxation, they must be re-drawn at the expense of the solicitors offering them for taxation before the taxing officer certifies thereon the amount at which they are taxed.

The bill of costs in this case must be referred back to the master to be taxed on the principles above stated; rejecting the costs of the two special motions where the late chancellor denied costs to either party. The bill must be re-drawn, so as to include the several items of fees due to the examiner in detail, together with the costs of opposing the application to file a bill of review, and the costs of the enrolment of the decree of this court founded on the remittitur, and of the execution to carry the decree into effect; and excluding the items of the present bill which are declared to be improper. A copy of the bill as re-drawn, with the usual notice of taxation, is to be served, and neither party is to have any costs on this application for a re-taxation.

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Stafford

v.

Bryan.

1830.

Mohawk B'k.
v.
Atwater.

*THE MOHAWK BANK v. R. & P. ATWATER.

A creditor may file his bill to set aside a fraudulent conveyance of the real estate of his debtor as soon as he has obtained a judgment, which is a lien on the land.

A judgment continues to be a lien on real estate, after the expiration of the ten years, as against the defendant in the judgment or his grantee without valuable consideration, but not as against bona fide purchasers or incumbrancers.

Where a debtor with an intention of defrauding his creditors executes a conveyance of his property without any valuable consideration being paid by the grantee, the conveyance is void as against such creditors, although the voluntary grantee was not privy to the fraud.

Where a party is examined as a witness between other parties in the suit, he is always examined subject to all just exceptions, and if he is interested, the objection may be taken at the hearing, although it has not been previously made.

But in ordinary cases the objection to a witness must be made at the time of his examination, or before the closing of the proofs in the cause.

It is the duty of the sheriff to sell lands in parcels where the property is so situated that it will probably produce more by that mode of selling; or where a part only is required to satisfy the execution.

But a sale of several parcels together does not render the sale void, but only voidable; and after a great lapse of time the sale will not be disturbed.

Feb. 16th. In May, 1816, Russell Atwater was the owner of the premises in question in this cause, together with a large tract of land in the county of St. Lawrence. By a deed of that date, in consideration of one dollar and the love and good will which he bore to his son Phineas, he conveyed to him the mill lot now in controversy with the buildings thereon. At the date of this conveyance R. Atwater was extensively indebted to the complainants and others, and as the event proved, was then insolvent, although he had at the time considerable property in his hands. On the first of July, 1816, the complainants obtained a judgment for their debt against R. Atwater, and in 1817 they issued an execution upon such judgment, by virtue of which, in March, 1818, the lands of R. Atwater

in the county of St. Lawrence, including the mills and mill lot in controversy, were sold by the sheriff of that county and were purchased in for the complainants by their cashier, to whom they were conveyed by such sheriff. A large balance still remains due upon the complainants' execution, and the *complainants have offered to both defendants to reconvey to them the whole property purchased at the sale upon receiving the amount of their debt and advances. The bill in this suit was filed in 1825 to set aside the conveyance of May, 1816, upon the ground of its being fraudulent and void, and in order to obtain possession of the mills and mill lot in question, and for an account of the rents and profits thereof. Numerous witnesses were examined, and the cause was finally heard upon the pleadings and proofs, at the last March term.

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A. Van Vechten and *A. C. Paige*, for complainants. The deed from the defendant Russell Atwater to the defendant Phineas Atwater, was a voluntary conveyance and without consideration, and was, therefore, fraudulent and void as against the creditors of Russell Atwater, he being deeply involved in debt at the time of the execution of the deed. Being indebted beyond an ability to pay is conclusive evidence of fraud. A man in embarrassed circumstances cannot provide for his family at the expense of his creditors. A voluntary deed is void equally against subsequent as against prior creditors. (*Jackson ex dem. Van Wyck v. Seward*, 5 Cowen's R. 67, 72. *Reade v. Livingston*, 3 John. Ch. R. 481. 3 Cruise's Dig. 374, tit. 32, ch. 22, § 26, 28. Id. 377, tit. 32, ch. 22, § 32, 33. Id. 385, tit. 32, ch. 22, § 51. *Jackson v. Brush*, 20 John. R. 5. *Hildreth v. Sands*, 2 John. Ch. R. 48. *Verplanck v. Sterry*, 12 Johns. R. 552. *Murray v. Riggs*, 15 Johns. R. 587. *Anderson v. Roberts*, 18 Johns. R. 526, *per Spencer, Ch. J.*) Deeds executed with intent to defraud creditors, although made for a good and valuable consideration, are void. Actual fraud in giving a conveyance of real property may be inferred from circumstances. (3

1880. Cruise, 372, tit. 32, ch. 22, § 19. 3 id. 394, tit. 32, ch. 22, § 63. *Sands v. Hildreth*, 14 John. R. 493. *Wickham v. Miller*, 12 John. R. 320. *Jackson v. Myers*, 18 John. R. 425. 3 Bac. Ab. 312, 314, title Fraud c. *Jackson v. Terry*, 13 John. R. 471. *Hildreth v. Sands*, 2 John. Ch. R. 35, 41.) The circumstances of this case show, that the deed in question was given with intent to defraud creditors. To make a bona fide purchase, payment of the consideration money must be made *out; it must be actually paid, and not merely secured to be paid; for otherwise the purchaser could not be hurt. (*Jackson v. Cadwell*, 1 Cowen's R. 641, 2. *Jewett v. Palmer*, 7 John. Ch. R. 65, 68. *Hendricks v. Robinson*, 2 John Ch. R. 283.) The consideration expressed in the deed is one dollar, and paternal love and affection. The defendants cannot now set up a different consideration; for the rule is well settled that parties are concluded from setting up a different consideration from the one expressed in the deed, except in the cases of fraud, mistake, or surprise. (*Botsford v. Burr*, 2 John. Ch. R. 415.) Upon no other ground can a deed be contradicted by parol proof. The rule of evidence that parol proof is inadmissible to contradict or substantially vary the legal import of a written agreement, is the same in equity as at law. (*Stevens v. Cooper*, 1 John. Ch. R. 429.) Where the consideration is expressly stated in a deed, and it is not said, "and also for other considerations," proof of any other consideration is inadmissible. (*Maigley v. Haiver*, 7 John. R. 341.) This doctrine was recognized by Chancellor Kent, in *Benedict v. Lynch*, (1 John. Ch. R. 381.) In that case he cites the case of *Peacock v. Monk*, (1 Ves. sen. 127,) where Lord Hardwick held the same doctrine. It would seem then, that if Phineas Atwater had paid a valuable consideration for the deed in question, it could not have availed him, as he is bound by the consideration expressed in the deed. The evidence produced to show that the mill lot was accepted from the sale is altogether insufficient. The whole

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transaction between Russell and Phineas Atwater is stamped with fraud. In May, Russell Atwater was pressed to pay his debt to the complainants. In June thereafter, he gives this deed. He gives it, too, without consideration; for it is evident that the mill was erected with his money; and the services of Phineas not only appear to have been rendered during his minority, but they also have been proved to have been of no value. Judgment creditors may always come into chancery to have a fraudulent incumbrance or conveyance removed. It is too late now to suppress D. Boyd's testimony upon the ground of interest. The objection should have been made before the proofs were *closed. Agents having an interest, are good witnesses in relation to matters connected with the agency. No objection or complaint was made at the time as to the mode of sale. It is now too late to make such objection. It is not put in issue by the pleadings; and the defendants having so long acquiesced in the sale, cannot now disturb it.

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D. Selden, for defendants. The witness D. Boyd was interested, being a stockholder in the Mohawk Bank. The complainants were bound to show that his interest had ceased to exist or had been discharged. The deed to Phineas Atwater is valid, and was given for a sufficient consideration. The consideration expressed was not intended to deceive any person. The transaction was not kept concealed, but was made as public as it well could be. Mills are so important to large tracts of land that it would advance the interest of a large land holder to grant a mill seat for no other consideration than that of having a mill erected upon his land. The services of Phineas Atwater were valuable to his father, and fully equal to the decreased value of the land at the time the deed was given. Where the contract is binding between the parties, and is sought to be impeached by proof aliunde, it may be supported by like proof. In all the cases cited

1880. on the other side, one of the parties to the deed sought
 Mohawk Bk. himself to enforce it. (*Botsford v. Burr*, 2 John Ch. R.
 v. 415. *Green v. Weston*, Sayre's R. 209.) In a contro-
 Atwater. versy between one of the parties and a stranger, either of
 them may inquire into the whole character of the instru-
 ment. (3 Starkie on Ev. 1051. *King v. Inhabitants of*
Scammonden, 3 T. R. 474. *King v. Inhabitants of Lain-*
don, 8 id. 379. *King v. Inhabitants of Shenfield*, 14
 East's R. 544.) Grantees may always inquire into the
 true consideration of conveyances, when there is in fact
 some other consideration than the one expressed. A deed
 fraudulent in its inception may become valid by matter
 ex post facto. (*Verplanck v. Sterry*, 12 John. R. 552.)
 Thus the services of Phineas Atwater and wife subse-
 quent to the date of the deed may render it valid as the
 consideration thereof. (*Murray v. Riggs*, 15 John. R.
 [*58] 587, opinion of Thompson, Ch. J.) *The complainants
 cannot inquire into the validity of the deed to Phineas
 Atwater, for they have not shown in their bill that their
 demand is unsatisfied. They cannot succeed as purchas-
 ers, for they never purchased the mill. As judgment cred-
 itors, they have no title from which to remove a cloud.
 The sale was void, the whole tract of land having been
 sold together, and not in parcels. (*Woods v. Monell*, 1
 John. Ch. R. 502.) If there be doubts whether any par-
 ticular parcel was sold, the court will intend it was not
 sold.

THE CHANCELLOR. The main question in this cause is
 whether the deed of R. Atwater to his son is to be con-
 sidered fraudulent and void as against these complainants
 as judgment creditors. If it was void as against them,
 they had a right to file their bill to set it aside as soon as
 they obtained a judgment, which was a lien upon the
 property. (*Beck v. Burdett*, 1 Paige's R. 308.) The
 judgment is still a lien upon the property as against these
 defendants, although it would not have been against a

bona fide purchaser, after the expiration of the ten years. 1850.
 If the property was not legally sold, the conveyance may Mohawk Bk
 still be set aside to enable the complainants to go on and v.
 sell it for the satisfaction of the residue of their debt; but Atwater
 if it was legally sold, they will be entitled to a decree for
 the immediate possession of the premises, and for an ac-
 count of the rents and profits, as well as to a decree setting
 aside the fraudulent conveyance. I shall, therefore, first
 consider whether the deed was void as against the com-
 plainants.

Previous to the decision of the court of errors in *Seward v. Jackson*, (8 Cowen's R. 406,) this court had decided that a voluntary conveyance was void as against creditors who had pre-existing debts. (*Read v. Livingston*, 3 John. Ch. R. 481. *Bayard v. Hoffman*, 4 id. 450.) The principle of these cases was adopted by the supreme court in the case of *Jackson v. Seward*, (5 Cowen's R. 67,) and by the supreme court of the United States in *Sexton v. Wheaton and wife*, (8 Wheaton, 229.) But since the decision of *Seward v. Jackson*, the correctness of the former decisions is left in great doubt, if they have not been wholly overturned. From the conflicting opinions of various members of the court, it is impossible to say upon what principle the majority of those voted who were in favor of the reversal of the judgment of the supreme court; but if they adopted the opinion of Spencer and Allen, senators, a voluntary conveyance is not void even as against antecedent creditors. It is only prima facie fraudulent as against them; and it is doubtful whether the revised statutes have not gone still farther, and thrown the onus probandi, in all cases, upon the creditor who attempts to impeach a voluntary conveyance as fraudulent. (2 L. S. 137, § 4, and revisors' note.) This statute, however, cannot affect the decision of this court upon a case which had previously arisen.

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From the testimony, I am satisfied that this conveyance was fraudulent in fact as against the creditors of the

1880. father. At the time of the conveyance, the grantor was
 Mohawk Bk. indebted to various individuals in a sum exceeding fifty
 Y. thousand dollars, most of which was then due. His
 Atwater. property, to a great extent, was in wild lands, which could
 not be converted into money in time to meet the demands
 of his creditors, even if it should ultimately prove sufficient. In this situation, and a few weeks before he confessed the judgment to the complainants, and when they were undoubtedly pressing him for payment, he conveyed this mill site, on which he had already contracted to build an extensive establishment. Independent of the deed's purporting on its face to be a voluntary gift to the son, the weight of evidence is that no real consideration passed between him and the father. The defendants do not allege in their answer that the son had performed services, after he became of age, which constituted any part of the consideration of the conveyance. It is also evident from the testimony that a great portion if not all of the funds which were afterwards expended in making the erections on the premises were the proceeds of the father's property, which ought to have been devoted to the payment of his honest creditors. It is of no consequence in this suit whether the son knew the extent of his father's indebtedness or not. If the father committed a fraud upon his creditors by giving away property which should have been reserved for them, the grantee without valuable consideration cannot be protected, although he was not privy to the fraud. The deed of 1816 must therefore be declared fraudulent and void as against the
 [*60] *complainants, and all persons claiming as purchasers of the premises under their judgment against Russell Atwater; and the defendant Phineas Atwater must release to the complainants all interest in the premises derived by him under that deed.

The next question is whether there was a valid sale of this property under the judgment, so as to entitle the complainants to the possession of the premises without

the expense and delay of a new sale by the sheriff. On this question, the evidence of David Boyd is material; and it may be necessary to consider an objection made to his testimony on the hearing.

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It is alleged that he was a stockholder in the bank at the time he gave his testimony, and was therefore an incompetent witness for the complainants. If this were true in point of fact, and the objection had been made in time, his testimony must have been excluded. A stockholder in a moneyed corporation cannot be a witness in its favor, where the result of the suit will be to increase or diminish the funds of the institution.[1] The witnesses

[1] The belief of a witness that he is interested in the event of the suit or a feeling of honorary obligation to the party calling him, it seems, is no objection to his competency, if in fact he has no legal or equitable interest in the event of the suit. *Stall v. Catskill Bank*, 18 Wen. 466. *Gilpin v. Vincent*, 9 J. R. 219. *Stockham v. Jones*, 10 J. R. 21. *Moore v. Hitchcock*, 4 Wen. 292. *Frost v. Hi'l*, 3 Wen. 386. *Watson v. Smith*, 13 Wen. 51. A person is not incompetent as a witness because he believes himself interested in the event of the suit; the court and not the person called as a witness must decide upon his competency. Objections arising from a supposed moral or honorary obligation, go merely to the credibility of the witness. *Commercial Bank of Albany v. Hughes*, 17 Wen. 94. The general rule as to the competency of a witness, although there may be some technical exceptions, is that if the witness will not gain or lose by the event of the cause, or if the verdict cannot be given in evidence for or against him in another suit, the objection goes to his credit only, and not to his competency. S. C. 14 J. R. 81. The general rule is, that if a witness cannot gain or lose by the event of a suit, or if the verdict cannot be given in evidence for or against him, in another suit, the objection goes to his credit, and not to his competency. *Van Nuys v. Terhune*, 3 J. C. 82. *Case v. Reeve*, 14 J. R. 79. An interest in the question only does not disqualify a witness, but the objection goes to his credit only. It was held that if the effect of the testimony of a witness be to create or increase a fund in which he will be entitled to participate, he is incompetent. *Phoenix v. The Assignees of Ingraham*, 5 J. R. 258. *Pylon v. Hallett*, 1 Cai. R. 364. *Stewart v. Kip*, 5 J. R. 256. *Ten Eyck v. Bill*, 5 Wen. 55. The competency of a witness on the score of interest must be shown to be certain; it may not be presumed from circumstances; when the effect of his testimony will be to increase, create, or prevent the diminution of a fund in which he is entitled to share, and without which his claim will be lost in whole or in part, the interest is direct and certain,

1830. **Mohawk Bk.** were examined on written interrogatories. No objection
v. was made to the competency of David Boyd as a witness
Atwater. during his examination, or at any time before the proofs
 in the cause were finally closed. He was examined as a

and such witness may not testify. But if the fund actually exists, and will continue whatever the event of the suit, a witness called to protect or increase it, is competent, unless it appear that the fund as it is, is not enough to meet the charges on it. *Duel v. Fisher*, 4 Denio, 515. A remote or contingent interest goes only to the credit of the witness, not to his competency. *Stewart v. Kip*, 5 J. R. 256. A person interested in the event is competent, when called on to give evidence contrary to his interest. *Jackson ex dem. Youngs v. Vredenberg*, 1 J. R. 159. If a witness stands in that situation, that which way soever the suit may terminate, he will be equally liable, and to the same extent, to the losing party, he is admissible. *Marquand v. Webb*, 16 J. R. 89. In an action brought by an operative, under the city of New York lien law against the owner of a building, the builder cannot be a witness, being interested. And his incompetency cannot be removed by a release. *Minor v. Hoyt*, 4 Hill, 193. The necessity which authorizes the calling of an interested witness must be general in its nature, embracing a large and definite class of cases, and such as arises in the natural and usual course of human affairs. A teller in a bank comes within the rule, and is a competent witness for the bank, although he has given a bond with sureties for the correct discharge of his duties. *U. S. Bank v. Stearns*, 15 Wen. 314. Where on a trial of a cause in assumpsit on a promissory note against several defendants, the jury were instructed to pass upon the liability of one of the defendants, and a verdict was rendered in his favor, he is not a competent witness in favor of his co-defendants. *Griswold v. Sedgwick*, 1 Wen. 126. If an action, though in form ex delicto, is, in fact, founded on a joint contract of the defendants, and a person offered by them as a witness, (e. g. case against common carriers,) the rule that joint tortfeasors are not liable to contribute, does not apply, and the witness is incompetent. *Curtis v. Monteith*, 1 Hill, 356. The rule that a release by one of several joint creditors, discharges the debtor as to all, does not apply to releases by partners, inter se. Ib. Where the fact to be proved by a witness is favorable to the party who calls him, and the witness will derive a certain advantage from establishing the fact in the way proposed, he cannot be heard, whether the benefit be great or small. *Marquand v. Webb*, 16 J. R. 89. Where a defendant in ejectment sets up as a defence that he was not in possession when the declaration was served, his lessee is not a competent witness to the fact, as he has an interest both in the question and in the event. *Jackson ex dem. Van Den Bergh v. Trusdell*, 12 J. R. 246. In ejectment for dower, the defendant offered B., his landlord, as a witness, and it appeared that B. had leased to the defendant for years, with

witness in July, 1828. Several weeks after his testimony was closed, John Boyd, the father-in-law of one of the defendants, in answer to the last and general interrogatory, stated among other things that about the time of the sale

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a covenant for quiet enjoyment; and that B.'s title was a lease in fee from V., containing a like covenant, and reserving rent and a quarter sale; held, that B. was incompetent, notwithstanding V.'s covenant to him, his interest preponderating in favor of his tenant. *Moak v. Johnson*, 1 Hill, 99. The possession of the tenant being that of the landlord; in ejectment against the former, the latter is, in general, incompetent as a witness for him. 1b. The witness' interest, in order to exclude him, must not have arisen after the fact to which he is called to testify happened, and by his own act, without the interference or consent of the party by whom he is called. *Jackson ex dem. Woodhull v. Rumsey*, 3 J. C. 234. Where a witness is interested in any part of the demand of the plaintiff, he cannot be admitted to testify as to another part. *Gage v. Stewart*, 4 J. R. 293. If a person whose lands are bound by a judgment, execute a deed with warranty of the same lands, and they are afterward sold under a *fi. fa.* on that judgment, in an action between the vendee and the purchaser at the sheriff's sale, he is an incompetent witness to invalidate the judgment. *Swift v. Dean*, 6 J. R. 523. The vendor of a chattel is not a competent witness in an action against the vendee for taking it away, for he is bound to warrant the title. *Heermance v. Vernoy*, 6 J. R. 5. A transfer by a stockholder of his stock in an incorporated or joint stock company, passes his interest to the purchaser, although the transfer be not conformable to the by-laws of this company. And after such transfer, the former owner is a competent witness for the defendants in an action against the company. *Gilbert v. Manchester Iron Co.*, 11 Wen. 627. A party having no fixed legal interest in the event of a cause is a competent witness, although he declares himself bound, in honor, to share in the loss which may be secured by the party calling him. *Moore v. Hitchcock*, 4 Wen. 293. If a witness be called, and he declares himself interested on the side of the party who calls him, and this interest be so circumstanced that he cannot be released by the party calling him, and he will run the risk of the bias on the mind of the witness, then he ought to be sworn. *The Trustees of Lanningburgh v. Willard*, 8 J. R. 428. But where a witness has in fact no legal interest in the event, and does not think himself legally interested in the event, but feels himself legally obligated in honor to share in the loss, if any, in such case it has been decided that he is competent and ought to be sworn. *Gilpin v. Vincent*, 9 J. R. 220. So, where the question was as to the competency of the witness Hurd. He was a plaintiff in the judgment, by virtue of which the property in question was sold, he did not agree to indemnify the officer, but his co-plaintiff did, and he felt himself bound in honor to contribute to the indemnity of the sheriff. He was

1830. he understood from D. Boyd that he was a stockholder in
 Mohawk Bk. the bank. Under the circumstances, the objection should
 v. have been made before the proofs in the cause were
 Atwater. closed, so that the complainants might have introduced
 witnesses to disprove the allegation of interest, or have
 released and re-examined the witness. If Boyd was a
 stockholder in 1818, it does not follow that he was in 1828.
 The presumption of a continuance of his interest to that
 time would be very slight.

[*61] Where a party is examined as a witness as between
 other parties in the suit, he is always examined subject to
 all just exceptions, and only as to those matters in which
 he has no interest. In such a case it is not too late to
 make the *objection to his testimony at the hearing. In
 other cases the objection must be made at the time of

called to support the regularity of the sheriff's sale. If that was irregular,
 the sheriff was a trespasser, and might be made liable as such. The
 sheriff had his remedy against B., and the witness thought himself bound
 in honor (but not legally) to share the loss with B.; held, that he was
 within the rules of the cases cited above, a competent witness, and should
 have been sworn. He had no fixed interest in the event of the suit.
Moore v. Hitchcock, 4 Wen. 292. A debtor whose title to lands acquired
 under a judgment and execution against him is sought to be recovered by
 a purchaser, is interested, and not a competent witness for such purchaser,
 in an action brought for the recovery of lands. *Jackson v. Peck*, 4 Wen.
 300. A party in possession of lands is a competent witness for a plaintiff
 in an action involving the title of such lands, although he admit that he
 should prefer that the plaintiff might succeed hoping to purchase from
 him on better terms than from the defendant; the objection is to his credi-
 bility. *Jackson v. Leek*, 12 Wen. 105. A mere request to a party to be-
 come the surety of a third person in respect to the costs of a suit, without
 an offer to indemnify against risk, is enough to render the person making
 such request an incompetent witness, if such suretyship be assumed. *Mul-
 heran's Executors v. Gillespie*, 12 Wen. 349. Where a judge at a trial re-
 ceives the testimony of a witness, who is objected to as incompetent, upon
 the facts already proved, reserving the question of competency, the testi-
 mony of the witness thus sworn, *de bene esse*, is not to have any weight
 in determining his competency; but this must be referred exclusively to
 the other evidence given in the course of trial. *Mott v. Hicks*, 1 Co.
 514.

his examination, or at least before the proofs in the cause are closed.[1]

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There is certainly much contradiction in the testimony, as to what was actually sold by the sheriff; but I think the weight of evidence is, that the lot which included the mills, &c. was sold, without any reservation of this part thereof. If this matter is left doubtful by the parol proof, the sheriff's deed is very strong evidence in favor of the complainants on that point, and must settle the question in their favor. It would be going too far to say the sheriff's deed must be conclusive; but after such a lapse of time, the deed of the sheriff given immediately after the sale, and when he was acting under his oath of office, ought not to be set aside except on the most conclusive evidence of fraud or mistake in the description of the property.

The defendant's fifth point is, that the property of Russell Atwater was sold together, and not in separate parcels. It is undoubtedly the duty of the sheriff to sell in parcels whenever the property is so situated that it will probably produce more by that mode of selling, or where a part only of the property is required to satisfy the execution. In this case a large tract was sold together; but it was

[1] An objection to the competency of a witness, on the ground of interest, must be taken before the closing of the proofs; it is too late to object when the cause is brought to a hearing on the pleadings and proofs. *Gregory v. Dodge*, 14 Wen. 593. If evidence, competent at the time it is offered, be objected to, and the objection overruled, become incompetent by subsequent proof, the objection must be renewed, or the party making it will be deemed to have waived his right of excepting. *Mitchell v. Roulstone*, 2 Hall, 351. Where a witness is called, and, on objection to his competency, is put on his *voire dire*, and answers generally that he is interested, he should be rejected; if the party calling him wishes to show the nature of the interest, as that it is ideal, or such as will not exclude the witness, he should follow up the examination with particular questions. *Williams v. Matthews*, 3 Cow. 252. Without doubt the court were authorized to require from the witness a statement of the nature of his interest, but this was discretionary, and does not in that case seem to have been called for; the plaintiff acquiesced in the general answer. *Ib.*

1830. encumbered by heavy mortgages, and the whole tract
Mohawk Bk would not have been sufficient to satisfy the execution by
 v. any mode of selling. In the peculiar situation of this
Atwater. property it is impossible to say whether the sheriff adopted
 the proper mode to make it produce the best price. A
 sale thus made is not void; it is at most voidable; and
 after such a lapse of time, great injustice might be done
 by vacating the same.

But in this case another objection exists to this defence.
 There is nothing said in the bill as to the manner of sell-
 ing the property, and no objection is made in the answer
 that it was sold together and not in parcels. The whole
 of the defendant's testimony on that subject is therefore
 on a point not in issue by the pleadings, and no decree
 can be founded thereon. If this defence had been set up
 in the answer, the complainants would have been ap-
 prised of the necessity of showing by the testimony of
 [*62] witnesses acquainted with the *property and the incum-
 brances thereon, that the mode of selling adopted by the
 sheriff was that which was most beneficial for all con-
 cerned.

The defendants must therefore deliver up the possession
 of the premises to the complainants, on production of a
 copy of the decree in this case; and there must be a
 reference to a master residing in the county of St. Law-
 rence to take an account of the rents and profits of the
 premises received by P. Atwater, or which he might have
 received by reasonable diligence while he has been in
 possession thereof. And on the coming in and confirma-
 tion of the master's report, the complainants are to have
 execution against the defendant P. Atwater for the amount
 reported due, and against both defendants for the costs of
 this suit to be taxed.

CASES IN CHANCERY.

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In a suit against the husband for a divorce, if he suffers the bill to be taken as confessed and a divorce is granted, costs follow of course.

The wife is also entitled to alimony if her circumstances render such an allowance either necessary or proper.

The reference to the master to ascertain the truth of the facts charged in the bill is to satisfy the court, and to prevent collusion between the parties; and the husband cannot set up any matter, in opposition to the wife's claim for costs or alimony, which if set up by an answer would have been a sufficient ground for refusing a divorce.

Where the wife obtains a divorce upon the ground of adultery, a reasonable counsel fee may be allowed and taxed against the husband.

The complainant filed a bill in this case to obtain a divorce upon the ground of the adultery of her husband. He suffered the bill to be taken as confessed. On reference to a master the facts charged in the bill were fully established. Upon the coming in of the master's report,

March 2d.

J. L. Mason, for the complainant, moved for a divorce and for costs. He also claimed alimony for the complainant, and applied for an allowance, to discharge her reasonable counsel fees and for the support and maintenance of the children of the marriage.

**W. Talmage*, for the defendant, admitted that the complainant was entitled to a decree for a divorce; but he contended that there was not sufficient evidence in the case to entitle her to costs or to an allowance for alimony.

[*03]

THE CHANCELLOR. By suffering the bill to be taken as confessed, the defendant admits he has been guilty of the adultery charged, and under such circumstances as to entitle the complainant to a divorce. He cannot afterwards set up any matter in opposition to her claim for costs, or for alimony, which if true would have been a sufficient

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ground for refusing the divorce. If any such matter existed, the defendant should have put in an answer, insisting thereon as a bar to the suit. The reference to a master is to satisfy the court that a divorce ought to be granted, and to prevent collusion between the parties. If the complainant is entitled to a divorce on the ground of the adultery, costs follow of course. If the wife is complainant, the husband who has been guilty of adultery cannot be excused from contributing to the support of the children of the marriage, or from an allowance by way of alimony to the wife, if her circumstances render such an allowance necessary or proper. There must be a decree in this case dissolving the marriage contract, and the usual clause must be inserted in every case of this kind, prohibiting the defendant from marrying during the life time of the complainant. Although the defendant would be punishable for felony if he married again, yet this clause is necessary in order to prevent him from imposing upon others, who might suppose he was capable of contracting matrimony if the decree was general.

The defendant must pay to the complainant or to her solicitor the costs of this suit to be taxed, including reasonable counsel fees to be settled and included in the same bill by the taxing officer.

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It must be referred to the master who made the report as to the matters stated in the complainant's bill, to ascertain and report which of the parties ought to have the care and custody of the children of the marriage; and if he shall award the custody of them or either of them to the wife, that *he also report what sums the defendant should pay to the complainant for their maintenance, and when and in what manner. And the master must also ascertain and report whether any and what allowance should be made to the complainant for her own support, and when and how the same ought to be payable; and what security should be given by the defendant for the payment of such sums as shall be fixed by the master for

the maintenance of the children, or for the support of the complainant. And all further questions and directions are to be reserved until the coming in of that report.

1890.

In the matter
of Browning

IN THE MATTER OF THOMAS BROWNING.

A purchaser at a master's sale is bound to complete the purchase, where the vendor shows a prima facie title, against which there are no reasonable grounds of suspicion.

If it appears that any person is making a claim adverse to the title of the vendor, or that there are probable grounds for supposing such a claim will be made, the court will direct the testimony of the witnesses to be perpetuated.

CATHARINE KOHLER, the special guardian of the infant children of Charles Kohler, deceased, under an order of this court, sold to Browning a piece of land at Bushwick, containing about two acres; and the sale having been reported to the chancellor, he confirmed the report, and directed a conveyance to be made to the purchaser. Browning then presented his petition, setting forth the proceedings and sale; that the property was sold at auction, and that a good title was to be given. He further set forth in his petition that he had paid the purchase money to the auctioneers, to be held by him until the title should be made satisfactory; that the deed had been executed in pursuance of the order of the court and placed in the hands of the petitioner's counsel for the purpose of an examination of the title; that the money had been paid over to the guardian upon an agreement to be refunded in case the title should prove to be defective. The petitioner further stated that his counsel had advised him the title was *defective, and he therefore prayed that the purchase money might be refunded to him, together with the interest thereon and the costs. A reference was made

March 2d.

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1830. to a master to ascertain and report whether the title of the
In the matter of Browning. infants was good, and such as the petitioner ought to take
under the sale. The master reported that the title was
not valid, nor such as the petitioner ought to accept.
From this decision of the master the guardian appealed to
the court.

D. B. Tallmadge, for the infants.

Elijah Paine, for the petitioner.

THE CHANCELLOR. No person makes any claim to this property in opposition to the infants ; and the only question is what evidence of title a purchaser under an order of sale has a right to require. The abstract of title furnished by the guardian extends back nearly forty years, and no one has claimed the land in opposition to this chain of title during the whole of that time. Even without the admission of the petitioner's counsel, I think at this time it must be considered that a valid title passed to J. Williams under the deed of March, 1791, which is on record. In 1797, Williams conveyed the premises to F. Vandervoort, and this conveyance is also recorded. Vandervoort conveyed to W. Dougherty about the year 1804. Dougherty is dead, and his deed is not produced. But Vandervoort, the grantor, was examined before the master, and swore that he sold and conveyed the land to Dougherty, for the consideration of £28, with warranty; that Dougherty went into possession, and built a house thereon. Dougherty lived on the premises until 1807, when he sold to N. Williamson, who is also dead. The deed from Dougherty to Williamson is not produced; but Vanderveer swears that Dougherty told him he had sold the land to Williamson. He also swears that afterwards, when he drew the deed from Williamson to Gosline, he had a deed before him from which he copied the boundaries, and which he believes was the deed from Dougherty to Wil

liamson. In 1811, Williamson and wife conveyed to W. Gosline, which deed is duly acknowledged. Gosline conveyed to W. Smith in 1816, and the *latter conveyed to the father of the infants in 1818; and upon his death the title came to them by descent. Both of these deeds are also duly acknowledged. The master has decided that the infants had not a valid title to the lands in question, but upon what ground the decision is founded is not stated in the report. I presume it is because the deeds from Vandervoort to Dougherty, and from the latter to Williamson, were not produced before him. When those deeds were given, there was no law requiring them to be recorded; and it was not the practice at that time to put deeds on record, except in recording counties. The removal and death of the grantees sufficiently accounts for their non-production; and it does not appear that any objection was made on the ground that the proper places had not been searched. As Williamson conveyed with warranty, it would be natural that he should keep the deeds on which his title depended, instead of handing them over to the grantee. In deciding upon the question of the validity of title, it is always proper to take into consideration the custom of the country at the time the conveyances were made. Since the recording acts were passed, it would be a circumstance of suspicion that no conveyance was found on record; and to protect the purchaser, the vendor would be bound to have all the deeds recorded which were necessary to the validity of the title. But where it is not necessary to have the deeds recorded, it is sufficient for the vendor to show a prima facie title, against which there are no reasonable grounds of suspicion; leaving the purchaser to establish such title by the ordinary proof, if it ever should be contested. If it appeared that any person was making an adverse claim, or there was any reason to suppose that such a claim would be made, the court might direct the testimony of the witnesses to be perpetuated. But it would be a useless ex-

1830.

In the matter
of Browning

1630. **Whitmarsh**
v.
Campbell.

[*67] pense, and it is unreasonable to ask it in a case like the present. Such a thing could never have been thought of by either party at the sale. The title to the property is not only valid but unsuspected. If no deed was ever given to Williamson, it is now nearly twenty-five years since he went into possession of the land claiming it as his *own. The master's report must be overruled; but as there was originally some color for objecting to the title, before the explanatory evidence was introduced, I shall not charge the petitioner with costs.

WHITMARSH v. CAMPBELL AND OTHERS.

A bill cannot be amended by inserting therein facts, known to the complainant at the time of filing the bill, unless some excuse is given for the omission.

March 2d. THE bill in this cause was filed in July, 1829, by a judgment creditor of Vanden Heuvel against the latter and against Campbell and Morris, to reach certain property which it was alleged the two last named defendants held in trust for Vanden Heuvel. Campbell and Morris put in their answer setting forth, among other things, that previous to the commencement of this suit, Vanden Heuvel had been proceeded against as an absent debtor; that the complainant's solicitor, together with two other persons, were appointed trustees of his estate under the act, in April, 1829, and took upon themselves the trust; and that the proceedings and appointment of trustees remained in full force. The complainant now moved for leave to amend his bill by stating therein these facts, and making the trustees parties defendants.

Ira Clizbe, for complainant.

J. Hoyt, for Campbell and Morris.

THE CHANCELLOR. The application to amend must be refused. The complainant does not pretend that he was ignorant of the matters now sought to be inserted in the bill when he commenced this suit, and no excuse is given for not inserting them at that time. His solicitor was one of the trustees appointed under the act, and took the oath of office as such trustee. The same facts were stated in the answer, and urged as an objection to the suit six months since; and no *excuse is made for not applying to amend the bill at that time. The rule as to amendments of injunction bills was laid down by the court in *Rogers v. Rogers*, (1 Paige's R. 424,) and must be adhered to.

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v.
Campbell.

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But these amendments must also be refused on the merits. If they had been stated in the bill originally, it would have appeared that the complainant was not the proper party to bring the suit, and the injunction would not have been granted. And if they are now introduced, the bill must be dismissed as against Campbell and Morris on the hearing. After their appointment, and trustees under the act became entitled to all the legal and equitable estate of Vanden Heuvel; and if Campbell and Morris have any property of his which either at law or in equity ought to be applied to the payment of his debts, the trustees are the proper persons to bring the suit, for the benefit of the creditors generally. If there was any collusion between the defendants and the trustees, the creditors might file a bill against both; or one creditor might sue in behalf of himself and all others who should elect to come in under the decree. But as the trustees act under oath, collusion between them and the defendants, or a wilful neglect of their duty, will not be presumed, when no intimation of the kind is contained in the affidavit on which this amendment is asked. The motion must therefore be denied with costs.

1880.

Astor
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Miller.

ASTOR v. MILLER AND OTHERS.

Where either real or personal estate upon which there is an outstanding mortgage, is turned into money, the rights of the mortgagee continue unaltered, and the court will direct the application of the money according to the rights of the parties as they existed previous to the alteration of the estate.

A mortgagee of leasehold premises who has never been in possession, or in the receipt of the profits of the estate, is not liable to an action upon the covenants contained in the lease, as the assignee thereof.

A mortgagee out of possession has both at law and equity only a chattel interest in the mortgaged premises; and the mortgagor, for every substantial purpose, is the real owner.

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Where a covenant was contained in a lease, on the part of the lessee, to pay all taxes and assessments which might be imposed on the premises by authority derived from the United States, the state of New-York, or from the corporation of the city of New-York, and an improvement was made by the corporation of New-York in the opening of La Fayette Place, which took a part of the leasehold premises, it was held that the lessee was chargeable with the amount of the assessment upon the interest of the lessor in the premises.

Where a covenant running with the land is devisable in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach upon each parcel pro tanto.

And the assignee of each part will be answerable for his proportion of any charge upon the land which was a common burden upon the whole, and will be exclusively liable for the breach of any covenant which related to that part alone.

March 16th. THE complainant, in 1821, leased Vauxhall Garden in the city of New-York, to Timothy Madden for the term of fourteen years from the first of May, 1825, at a yearly rent of \$750. The lease contained the usual covenant for the payment of the rent; and also a covenant that the lessee and his assigns would pay and discharge all such taxes and assessments as might be imposed or rated on the premises or any part thereof, by authority derived from the people of the state of New-York, or of the United States, or from the corporation of the city of New-York.

The lease also contained a clause of re-entry in case of the non-payment of the rent, or of the non-performance of the other covenants in the lease. In October, 1825, commissioners of estimate and assessment were appointed by the supreme court, on the application of the corporation of New-York, for the opening of La Fayette Place. In April, 1826, the commissioners reported, among other things, that part of Vauxhall Garden was required for the opening of La Fayette Place; that Astor was the owner in fee of the part required for that purpose, as well as of the rest of the premises; and that Madden was the owner of a leasehold interest therein. And the commissioners assessed the benefit of Astor as owner of the residue of the premises, over and above his damages from the loss of the part taken, at \$4447. They also assessed the damage to the leasehold interest of Madden in the part taken at \$5700, over and above the benefit to the premises which were left. This report of the commissioners was duly confirmed by the supreme court. In June, 1826, Astor filed his bill in this cause against *Madden and the corporation, claiming payment of the amount assessed on his interest in the property out of the amount allowed to Madden for his damages for the part taken. An injunction was granted; and afterwards, under an order of the chancellor, the amount assessed on the property of Astor was paid into court by the corporation. The residue of the damages awarded to Madden, after deducting the costs of the corporation, was paid to him. Madden died before answer, and the suit was revived against his administrator. The corporation and the administrator of Madden put in their answer to the bill, submitting the claim of Astor to the decision of the court. The cause was heard on bill and answer, and upon the petition of certain creditors of Madden. In April, 1828, the late chancellor Jones made a decree, by which it was declared that the assessment of \$4447 upon Astor's interest in the premises was chargeable on the lessee, by virtue of the covenants in the lease,

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and that the estate of Madden was liable for the payment thereof; but that there was nothing in the pleadings which showed that Astor had any specific lien upon the amount awarded to Madden, to the exclusion of other creditors of the latter. The chancellor therefore directed a reference to a master to take an account of the sums due to the complainant and to the other creditors of Madden, and also of the estate of the intestate. He also directed that the amount due to Astor for the assessment be paid in a due course of administration: that he be at liberty to insist before the master upon a right of priority in payment; and if he should establish such right by legal proof, on such reference, that the master report the facts to the court, with the reasons and grounds of his decision. Upon the reference before master Hoffman it appeared that in August, 1824, Madden mortgaged his interest in the lease of Vauxhall Garden to the Mechanics' Insurance Company and Moses Hoyt, for \$3469.19 and interest; that by virtue of this mortgage they claimed a specific lien upon the fund in court, and a preference in payment over other creditors. It also appeared before the master that in October, 1826, the sheriff of New-York sold to Mrs. Ehrick, under a judgment recovered subsequent to the mortgage, all the interest *of Madden in the leasehold premises; that in February, 1828, Mrs. Ehrick conveyed her interest in the premises which remained after the opening of La Fayette Place to Alexander Diver, for the consideration of \$523.55; and that on the same day the mortgagees, in consideration of one dollar, also released to him all their interest in that part of the premises. It also appeared that in September, 1828, Diver conveyed the said premises to Joseph Hunt; and that in October of the same year Hunt conveyed the same to the complainant. The master, upon these facts, reported that the complainant had a right of preference or priority of payment for the amount of his assessment, out of the fund now in court arising from the damages awarded to Mad-

den by the commissioners of estimate and assessment. The master also accompanied his report by a statement of the grounds and reasons of his opinion, as directed in the order of reference. To this decision and report of the master the mortgagees excepted.

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D. B. Ogden, for complainant. The complainant is entitled to have the moneys in court awarded to Madden for his damages applied to the payment of the sum assessed upon his (the complainant's) interest in the premises, for the opening of La Fayette Place. The complainant possesses a right of priority of payment out of this fund over every other creditor. His claim is paramount to that of the Mechanics' Fire Insurance Company and Moses Hoyt under the mortgage given by Madden upon the demised premises. The decretal order of Chancellor Jones decides that Madden, by virtue of the covenants in the lease from the complainant, was bound to pay the assessment against the complainant; but the chancellor did not decide as to the priority of the complainant's claim upon this fund. If it had been so decided, the reference upon this point to the master would have been unnecessary. The original lease contains a clause of re-entry for the non-performance of any of the covenants therein. The moment therefore Madden neglected or refused to pay the amount of the assessment, his term ceased and the complainant became entitled to the whole benefit of the lease and to the sum *awarded by the commissioners to Madden, to which Madden was only entitled by virtue of his leasehold interest in the premises. The present claimants of this fund had notice that it had been awarded to Madden, and they took no steps to secure their claims during his life. The Mechanics' Fire Insurance Company, as assignees of the lease, are liable to the covenants of the lessee. The authorities in support of this doctrine are cited in the report of the master. Any person taking an assignment of a lease, takes it with full notice of the covenants contained

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in it, and voluntarily submits to be bound by them. He takes it cum onere. An assignment by way of mortgage has the same operation as an absolute assignment. It is an assignment of the legal estate, and must be accompanied by all the consequences of the ownership of such estate. Until the money is paid, the assignment is absolute. And the claim made under it at this time is upon the ground of the possession of the legal estate, which is equivalent to a possession of the premises. And the mortgagees have shown an act of possession of the premises on their part, by selling the same during the whole of the unexpired term of the lease. The moneys awarded to Madden arise out of his interest in this estate under the lease from the complainant. Equity requires that he should not acquire a benefit under such lease to the injury of his landlord, by a breach of his covenants contained in the lease.

P. A. Cowdry and D. T. Blake, for Moses Hoyt and The Mechanics' Fire Insurance Company. The mortgagees of Madden had a specific lien upon the estate of the lessee, and they are now entitled to a priority of payment out of the fund in consequence of such lien. The complainant, by not paying the assessment, but suffering his estate in the leasehold premises to be sold for eleven years, has lost his claim upon his covenant. The liability of the lessee to the complainant rested in action merely, and the demand can only be on a par with other debts by specialty, while the mortgagee held a specific lien upon the estate of the lessee. If Madden had been alive at the time of the decree of the late chancellor, it is evident that the fund now in court would *have been ordered to be paid to him. If the mortgagee had applied to intercept this money, it is clear that as it was the proceeds of the estate mortgaged, it would, under the authority of the case of *Belcher v. Butler*, (1 Eden's Rep. 523,) have been directed to be paid to the mortgagee. A mortgagee of a

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leasehold estate not in possession is not liable upon the covenants in the lease. At common law it was formerly held that a mortgagee was seized of the legal estate, and after the estate became absolute by the non-performance of the condition, was liable to all the charges upon the mortgagor. (1 Powell on Mort. 6, 108. *Plaintiff's counsel arguing in Eaton v. Jaques*, Doug. 442.) It is upon this obsolete doctrine that the decisions have been based, which made the mortgagee of a lease liable to the covenants contained therein. In the case of *Eaton v. Jaques*, (Doug. 438,) it was held that the mortgagee of a lease, if not in possession, should not be held liable upon the covenants contained in the lease. This doctrine is confirmed in the case of *Walker v. Reeves*, (cited in a note to Douglas, 444,) and in the case of *Chinnery v. Blackburne*, (cited in a note to 1 H. Black. 117,) and in *Jackson v. Vernon*, (1 H. Black. R. 114.) The doctrine laid down in the case of *Eaton v. Jaques* is recognized in 2 Cruis. Dig. 114, tit. 15, ch. 2, sect. 14, and in 3 Comyn's Dig. tit. Cor. ch. 3, p. 273. All the cases which seem to hold a different doctrine, proceeded upon the ground that the mortgagee held the legal estate. (*Stone v. Evans*, Woodfall's Tenant Law, 113. *Lucas v. Comerford*, 1 Ves. jun. 235. *Williams v. Bosanquet*, 1 Brod. & Bing. 238. 3 J. B. Moore, 100.) But our courts hold that a mortgage is a mere security for money; that it does not pass the legal estate; and that the mortgagor is seized of the same. (*Green v. Hart*, 1 John R. 591. *Jackson v. Willard*, 4 id. 42. *Hitchcock v. Harrington*, 6 id. 294. *Sedgwick v. Hollenback*, 7 id. 376. *Bunyan v. Mersereau*, 11 id. 538. *Wilson v. Troup*, 2 Cowen's Rep. 231.) And the doctrine in the case of *Eaton v. Jaques* has been expressly recognized in *McIntyre v. Scott*, (8 John. 162.) The mortgagee in this case cannot be considered in possession so as to become *liable to the covenants in the lease. And the possession of the money would not impose the same obligations as would the possession of the leasehold

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1830. premises themselves. But if the mortgagee had taken possession of that part of the demised premises taken for La Fayette Place, he would not have been liable to the full amount of the covenants in the lease, but only to such portion of liability as attached upon his possession. (Comyn's Dig. tit. Covenant, ch. 3, p. 272. *Stevenson v. Lambard*, 2 East, 576. *Congham v. King*, Cro. Car. 221.) Nor would the mortgagee, although he should be considered in possession of the leasehold estate, be liable upon the covenant to pay the assessment in question, as this assessment was imposed, and the covenant broken long before the assignment of the lease. If covenants are broken before the assignment, the assignee is not liable. (Bul. N. P. 159. *Boulton v. Carron*, 1 Freem. 336. *Grescot v. Green*, 1 Salk. 199. *Church-wardens of St. Saviour's Southwark v. Smith*, 3 Burr. 1271, S. C. 1 W. Black. 351. *Taylor v. Shum and others*, 1 B. & P. 23. 1 Fonbl. ch. 5, sec. 6, note (g), p. 359.) The complainant having accepted an assignment of the lease, the same has become merged in the fee and the covenants have thereby become extinguished. (*Webb v. Russell*, 3 D. & E. 393. *Shep. Touch. ch. 7, p. 160.*)

THE CHANCELLOR. The decree of the late chancellor decides two questions which were not intended to be subject to the re-examination of the master on the reference; and that decision cannot be reviewed here on the exception to the master's report. In the first place it is declared and decreed that Madden the intestate, by the covenants in the lease, was bound to pay the amount assessed upon Astor's interest in that part of the premises which had not been taken for opening La Fayette Place; and that the estate of the intestate was chargeable with the amount of that assessment, to be paid in a due course of administration. Secondly, it was declared and adjudged that the facts set forth in the bill and answer did not give the complainant any specific lien on the fund in the hands of the

corporation, and which had been awarded to *the lessee for his damages. If either party was dissatisfied with the decree as to one or the other of these two particulars, the proper remedy was by an appeal from the decision of the court, or an application for a rehearing. The master is under a misapprehension in supposing the chancellor intended to refer it to him to review his decision on the last question, or to re-examine it himself on the coming in of the report. The claims of the different creditors of Madden, and their respective rights of priority of payment out of this fund, did not appear in the bill and answer. The chancellor anticipated that a different case might be presented as to the claims to priority between the complainant and other creditors of Madden, when their respective rights were proved before the master. The complainant was therefore permitted, notwithstanding this decision upon the facts stated in the pleadings, to insist upon and endeavor to establish by proof other facts which might entitle him to a priority in payment. The question now is, whether the new facts proved before the master give the complainant a right of preference which he was not entitled to on the facts stated in the pleadings.

Before proceeding to the examination of this question, I will briefly notice an objection made by the counsel for the mortgagees of the premises. This objection is founded upon a fact which occurred since the making of the decree by the late chancellor. It appears that Astor has neglected to pay the \$1447 assessed on his interest in the premises which remain, and has suffered that part of the property to be sold, for eleven years, to pay the amount. If the sum assessed on Astor's property had been raised by a sale of property belonging to Madden or to his estate, the claim of the complainant would have been extinguished. But I cannot see how a sale of the complainant's own property for that purpose could change the rights of the parties. He had his election to pay the money, or to permit his property to be sold to satisfy the assessment; and

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1880. it can make no difference to the other creditors whether
 Astor he paid it in the one way or the other.

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 Millen.

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The mortgage to The Mechanic's Insurance Company and Moses Hoyt did not appear in the pleadings, and is one of *the new matters produced in evidence before the master. This mortgage was given by Madden upon the whole of the leasehold premises before any part was taken for the opening of La Fayette Place. It was therefore a specific lien upon Madden's interest in the part taken for that purpose. The damages awarded to Madden in lieu of that interest became a substitute therefor; and upon the principles of equity, the mortgage then became a specific lien upon the fund, instead of his interest in that part of the land. The rights of mortgagees are not altered by turning the estate into money; for the court directs the money to be applied according to the rights of redemption. (*Belcher v. Butler*, 1 Eden's R. 530.) The fund in court therefore belongs to the mortgagees, unless the plaintiff is entitled to it through them, by virtue of the covenants in the lease, they being considered as the assignees of the leasehold premises.

Whether a mortgagee of leasehold premises who has never been in possession, or in the receipt of the profits of the estate, can be sued on the covenants contained in the lease as the assignee of the lessee, has for a long time been a disputed question. In *Sparks v. Smith*, (2 Vern. 275,) a bill was filed by the lessor to compel the mortgagee of a term to discover whether the lease was not assigned to him. The defendant insisted that he was never in possession of the premises, or in the receipt of the rents. The court said it was the mortgagee's own folly to take an assignment of the whole term by way of mortgage, and thereby subject himself to the covenants as assignee of the lease. But as he was only a mortgagee and had never been in possession, they would not assist the complainant to charge the defendant; but left the former to his remedy at law. In the subsequent case of *Pilkington*

v. Shaller & Jeffries, (2 Vern. 374,) where a recovery at law had been obtained against a mortgagee under similar circumstances, the court of chancery refused to interfere for her relief. In the case of *Eaton v. Jaques*, (Doug. 438,) which came before the king's bench eighty years afterwards, the judges of that court unanimously decided that the mortgagee, under such circumstances, was not answerable upon the covenants in the lease. Powell *supposes the case of *Lucas v. Comerford*, (1 Ves. Jun. 235,) decided by Lord Thurlow in 1790, to be directly in opposition to the decision of the king's bench in *Eaton v. Jaques* which had been made ten years previous to that time. (Powell on Mortgages, 241.) But upon examination of that case I see nothing inconsistent with the decision of the court of king's bench in the case reported by *Douglas*. It appears to be settled in England that a mortgagee, in possession, is liable on the covenants in the lease to the mortgagor. (*Traherne v. Sadlier*, 5 Brown's Parl. Cases, 179.) And Lord Thurlow only extended this principle to an equitable mortgagee in possession of a leasehold estate. It does not appear from the report of the case in *Vesey*, that the mortgagee was in possession, but it is more fully reported by *Brown*, where that fact distinctly appears. (3 Brown's Ch. R. 166.) A case is mentioned by *Woodfall* of *Stone v. Evans*, decided by Lord Kenyon in 1799, in which he is said to have overruled the decision in *Eaton v. Jaques*. (Woodf. L. & T. ch. 3, § 18.) I should infer from the language attributed to him in *Woodfall's* note of that case, that the mortgagee had once been in the actual possession of the premises under the mortgage. But in a still later case, (*Williams v. Rosanquet*, East. term, 1819, 1 Brod. & Bing. 72,) which was argued before ten of the English judges, although the decision in *Eaton v. Jaques* was considered law by some, a great majority of them were of opinion that it had not been rightly decided. It may therefore be considered as now settled in England, that a mortgagee of leasehold premises is liable to an action

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1880. on the covenants in the lease, although he has never been
 Astor in possession of the estate, or received any benefit there-
 v. from.
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[*78] But I apprehend such a principle cannot be sustained here. In the English courts of common law, the mortgagee is still considered as the owner of the estate, and the mortgagor only as his tenant. (*Patridge v. Bere*, 1 Dow. & Ry. 272.) In this state, the mortgagee out of possession is considered at law, as well as in equity, as having nothing but a chattel interest in the estate; and the mortgagor, for every substantial purpose, is the real owner. (2 John. Dig. tit. Mortgage, 111.) The master seems to have come to the same conclusion; but *he supposes that by taking the money awarded to the mortgagor for damages, the mortgagees are to be considered in equity as having taken possession of the estate, and thus subjected themselves to the burthen of performing the covenants in the lease. As the court considers a fund arising from a sale of the estate as a substitute for the estate itself, and suffers the mortgage to attach on it as such, the conclusion of the master may be correct in principle; but it is erroneous in its application to the peculiar circumstances of this case. In the view of the case which the master took, the mortgagees could only be considered as assignees of that part of the leasehold premises which was taken for La Fayette Place. The residue was sold under the judgment against Madden, and bid in by Mrs. Ehrick. She conveyed the same to Diver, and the mortgagees released to him all their claim thereon, for a nominal consideration. It was therefore discharged from the operation of the mortgage, and has since been transferred to the complainant. Where a covenant which runs with the land is divisible in its nature, if the entire interest in different parts or parcels of the land passes by assignment to separate and distinct individuals, the covenant will attach upon each parcel pro tanto. (Touchstone, 199. Co. Litt. 385 a. *Van Horne v. Crain*, 1 Paige's R. 455.) In

such a case, the assignee of each part would be answerable for his proportion of any charge upon the land which was a common burden, and would be exclusively liable for the breach of any covenant which related to that part alone.[1] Under such a lease as was given by the com-

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[1] The assignee of a mortgage in possession will be protected against an action of ejectment by the mortgagor, and all persons coming in under him; and this, though his assignment was obtained on a usurious consideration. *Jackson v. Bowen*, 7. Cow. 13. The lessees of the usurious assignee of a mortgage in possession, without notice of the usury, are to be considered bona fide purchasers, and will, as such, be protected against the allegation of usury. *Ib.* The recording an assignment of a mortgage is not necessary within any of the general registry acts. *James v. Morey*, 2 Cow. 246. It is, therefore, no notice to a mortgagor, so as to render payments by him to the mortgagee, in his own wrong. *Ib.* Nor is it notice to a subsequent assignee of the mortgagee. *Ib.* Nor to a subsequent purchaser or mortgagee of the premises. *Ib.* The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee at the time of the assignment, but not subject to the latent equities of third persons, unless the assignee have notice of such equities. *Ib.* Payments made after an assignment, but before notice of the assignment is given to the mortgagor, must be allowed to him. *Ib.* But it is not necessary to the protection of the assignee that he should give notice of his assignment to a subsequent assignee or purchaser. *Ib.* One assigns as mortgagee; whatever interest he afterwards acquires in the mortgaged premises enures to confirm the assignment. *Ib.* If a junior mortgagee in a recorded mortgage, without notice of a prior unrecorded mortgage, assign to another who has notice, such assignee will nevertheless hold the security discharged of the prior incumbrance. *Fort v. Burch*, 5 Denio, 187. If the donee of a power appendant and coupled with an interest (as a mortgagee) convey his whole estate, this would pass, but not extinguish the power. *Wilson v. Troup*, 2 Cow. 195. This is the common case of the assignment of a mortgage, which carries not only the legal estate, but all the remedies or powers attached to it. *Ib.* But a conveyance of a part of the estate will not carry with it a corresponding portion of the power. *Ib.* Because the power is indivisible. *Ib.* It can operate but once, and then is exhausted. *Ib.* A mortgage is a mere incident to the debt; and an assignment of the interest in the land without a nullity. *Ib.* A mortgagee, who has assigned the bond and mortgage, and guaranteed the payment of the debt, may take additional security from the mortgagor, in his own name, which will accrue to the benefit of his assignee, though he was ignorant of its being taken; and the mortgagee may avail himself of such additional security, until he is indemnified against his guaranty. *Evertson v. Booth*, on appeal,

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plainant in this case, if one half of the leasehold premises had been assigned by the lessee to A, and the residue to B, each would have been answerable for the taxes and assessments imposed upon their separate parcels of the

19 J. R. 486. Medcef Eden being in possession of a house and lot, claiming it as his own, in 1783, bought in an outstanding mortgage of the premises, executed in 1767, to secure the payment of a sum of money within one year after this date, and took an assignment of it. In 1798 he made his will, devising the mortgaged premises to one of his sons, named Joseph, and other property to another son, named Medcef, directing that if either of his sons should die without lawful issue, his share or part should go to the survivor, and appointing his two sons executors of his will. In 1804, the sons, as executors of their father's will, executed an assignment of the mortgage to Joseph Winter, in which, after the usual words transferring the mortgage, was a clause to this effect: "And we do hereby, for ourselves and heirs, release and convey unto the said J. W., his heirs and assigns, all our right, title and interest of, in and to the said lot of ground and premises before mentioned, and every part and parcel thereof." J. W. entered in 1804, and he and those claiming under him continued in possession until 1828. Joseph Eden died in 1813. Medcef Eden died in 1819. In 1822 an ejectment was commenced by the devisees of the latter, and judgment obtained in 1827, when the tenant was put out of possession; who, in 1828, turned round and brought an action of ejectment against the lessor of the plaintiff in the former suit, and recovered in the superior court of the city of New-York. On the writ of error, it was held that the plaintiff in the last suit was entitled not to recover; that the mortgage, at the time of the assignment to Winter, was not a valid and subsisting incumbrance; that Medcef Eden, the younger, at the time of the assignment, having a mere naked possibility of interest in the premises, and not a right in esse, such possibility was not the subject of release, and that the release being without warranty, Medcef Eden, the younger, and those claiming under him, are not estopped from setting up the title which devolved upon him on the happening of the death of Joseph Eden, or from alleging that the mortgage, by reason of lapse of time, in presumption of law was paid, and that the only purpose of the assignment was to pass the mortgage as a muniment of title during the continuance of the life estate of Joseph Eden. *Pelletreau v. Jackson*, 11 Wen. 110. The assignee of a mortgage does not by the deed of assignment acquire a legal title to the mortgaged premises, nor does he thereby become entitled to the rents, where the mortgaged premises are held by lease under the mortgagor. *Jackson v. Myers*, 11 Wen. 533. Where a previous mortgage is paid and the assignment obtained with the concurrence of the mortgagor, the assignee is entitled to interest on the sum paid, as well upon the interest as upon the principal. *Jackson v. Campbell*, 5 Wen. 572. A mortgagor is the owner of the prop-

estate; but neither would be answerable for the amount assessed upon the share of the other. By the act under which a part of the premises was taken for the use of the public, (2 R. S. 417, § 181,) it is provided that if part of a lot is taken which is under a lease or contract, all contracts and engagements between the landlord and tenant as to the part thus taken shall determine and be absolutely discharged, from the time of the confirmation of the report of the commissioners; *but shall remain valid and obligatory as to the residue of the premises. There is also a provision that the dissolution of the relation of landlord and tenant as to that part shall not affect any agreement between the parties as to the payment of any assessment under the act. The assessment in this case was not imposed on that portion of the premises of which the mortgagees now claim the proceeds, but upon the part which remained. This part, I have already shown, never came into the possession of the mortgagees, but passed to Mrs. Ehrick under the sheriff's sale. The covenant for the payment of the taxes and assessments thereon continued to run with that part of the leasehold premises, in her hands and in the hands of the assignees, until it was finally merged by the complainant's purchase of the outstanding term in October, 1828. Notwithstanding the sheriff's sale, the estate of Madden continued liable for the pay-

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erty mortgaged against all the world, subject only to the lien of the mortgage. *Astor v. Hoyt*, 5 Wen. 603. A mortgagee of a term not in possession cannot be considered as an assignee; but if he takes possession of the mortgaged premises, he has the estate cum onere. *Ib.* A covenant to pay assessments runs with the land, and if broken when the mortgagee enters, the lessor has his remedy in rem to enforce the covenant, but cannot proceed against the assignee personally; if the land has been converted into money, the lessor may claim the same in chancery in satisfaction of the damages sustained by the breach of the covenant. *Ib.* The assignee of the mortgagor was permitted to maintain trespass against the mortgagee after condition broken. The court conclude their opinion in that case by saying, "The light in which mortgages have been considered in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he of course is entitled to judgment." *Ib.* 615.

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ment of the assessment in consequence of his personal covenant to that effect. Mrs. Ehrick and her assignees were also liable on the covenant as running with their interest in the land while they continued the owners thereof. But no assessment ever was imposed upon that part which was taken for the use of the public; as to which the mortgagees may now be considered quasi assignees.

It is impossible therefore to give the complainant any prior claim upon the fund in court, without overturning the decision of the late chancellor, which I am inclined to think was correct; and the result is that the master's report in this respect must be overruled. As the amount due on the mortgage exceeds the whole fund in court, the mortgagees are entitled to the whole in satisfaction of their mortgage debt.

WARING AND OTHERS v. CRANE AND CANFIELD, EXECUTORS OF, &c.

Where a bill is filed on behalf of an infant by his next friend, the infant cannot be personally charged with the costs, unless, when he arrives at 21, he adopts the proceeding and elects to prosecute the suit.

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Where the suit is terminated before the infant becomes of age, the next friend will be chargeable with the costs unless there be a fund belonging *to the infant under the control of the court, and it appears that the suit was brought in good faith and with a bona fide intent to benefit the infant; in which case the court may direct the costs to be paid out of the fund.

If the suit was improperly brought, and the infant, when he arrives at 21, elects to abandon it, he may apply for a reference to ascertain the fact, and the bill will then be dismissed with costs to be paid by the next friend.

But if the suit was properly instituted for the benefit of the infant, and at 21 he elects to abandon it, he must, upon the dismissal of the bill, pay the costs of his next friend as well as those of the adverse party.

March 16th.

THE bill in this cause was filed in July, 1824, in the name of the complainants, who were infants, by A. Brun

son, as the next friend of W. Waring, and by W. Baker, as the next friend of the other three complainants; charging the defendants, who were executors, with mismanagement of the estate of the father of the complainants; and also alleging that one of the defendants was irresponsible. An injunction was granted restraining the executors from selling or disposing of the estate. In October, 1825, upon the application of the defendants, and with the consent of the counsel for the complainants, a receiver of the estate was appointed. On the fourth of March, 1827, W. Waring became of age; but without adverting to that fact the cause was brought to a hearing without giving any notice to him or calling upon him to appoint a solicitor. On the 16th of April, 1827, a decree for an account was made by the consent of the counsel for the defendants and of the guardians of the complainants. The cause was afterwards brought to a hearing on the master's report, but it being ascertained that one of the complainants was of age and had no notice of the hearing, the chancellor ordered the cause to stand over, that such complainant might have notice to appear and defend his rights. An order was subsequently made referring it to a master to inquire and report whether there were any just grounds for the commencement and prosecution of this suit; and whether the same had been prosecuted by the advice of counsel in good faith, and with the sole object of subserving the interest of the infant complainants; and to inquire and report whether the complainant W. Waring, since he became of age, had adopted the proceedings in the suit and assumed the agency and management thereof. The master reported that although there were *apparently, yet in fact there were no just grounds for the commencement of the suit; that the suit was commenced for the infants by the advice of counsel, and with the sole object of subserving their interests; that after W. Waring became of age, he took possession of the papers in the suit, and procured a master to proceed on the order of reference; and

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that since May or June, 1827, he had had the direction and management of the suit. After this report was made, the cause was brought to a final hearing, upon the pleadings, proofs, reports, and the objections of the complainants' counsel to the last report.

J. Edwards, for the complainants.

B. F. Butler, for A. Brunson.

P. S. Parker, for the defendants.

THE CHANCELLOR. If a bill is filed on behalf of an infant by his next friend, and the bill is dismissed or a decree is made in the cause before the infant is of age, he cannot be personally charged with the costs. They are to be charged against the next friend, unless there is a fund under the control of the court belonging to the infant, in which case the court may direct the costs to be paid out of that fund. (*Taner v. Ivie*, 2 Ves. sen. 466.) But the costs will not be charged on the infant's estate, unless the court is satisfied the suit was brought in good faith, and with a bona fide intent to benefit the infant. (*Pearce v. Pearce*, 9 Ves. 547. *Whitaker v. Marl*, 1 Cox's Cas. 285.) In *Turner v. Turner*, (2 Peere Wms. 297,) the next friend died before a decree in the cause. After the infant became of age, he refused to proceed in the suit; and the bill was dismissed against him with costs. But on a re-hearing in that case, Lord King reversed his former decree as to the costs, and decreed that the infant was not liable therefor. (1 Strange, 708, 2. Eq. Ca. Abr. 238, S. C.) If the suit was improperly brought, and the infant elects to abandon it when he becomes of age, he may apply to the court for a reference to ascertain the fact, and the bill will then be dismissed, with costs to be paid by the next friend. *But although the complainant elects to abandon the suit when he is of age, he cannot,

as a matter of course, compel the next friend to pay the costs. If the suit was properly brought for the infant's benefit, he must pay the costs to the next friend, and also those of the adverse party, when he applies to dismiss the bill. (Anon. 4 Madd. R. 461.) If he elects to proceed in the cause after he is of age, the next friend is discharged from his liability, and the infant will be liable in the same manner as if the suit had been commenced by an adult. (1 Harrison, 474. Mitford, 26.) The only exception to this rule must be, the case that sometimes occurs, where a decree has been made during his infancy, by which the infant's rights are bound. There the suit cannot be abandoned, although it was not brought in good faith, and was against the interest of the infant. In such a case, if the infant applied in time, the court might compel the next friend to remunerate him for the costs and expenses to which his estate had been improperly subjected, although he was compelled to proceed under the decree. In this case, W. Waring became of age before the decree was made against the executors for an account. He afterwards elected to proceed under the decree, and took the management of the reference into his own hands. He has therefore affirmed the act of his next friend in bringing the suit, and it is too late for him now to insist that it was improperly brought. His proportion of the defendants' costs must be charged on him personally, or be paid out of his share of the estate.

The situation of the next friend of the two complainants who have not arrived of age is different. If the suit was now in a situation to have the bill dismissed without prejudice to the rights of the infants when they come of age, I should be disposed to charge the costs upon their next friend, on the ground that the suit was improperly instituted by him, and without taking ordinary care to inform himself as to the facts. But some embarrassment now arises from the decree of April, 1827, under which the accounts of the defendants have been taken. By the

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will of the testator the defendants were trustees, both of the real and personal estate, until the youngest child became of age; and it was their duty to take care of *it until that time, and then sell or divide it among the complainants. Instead of consenting to a decree for an account, and asking for the appointment of a receiver, they should have asked for a dismissal of the bill; to enable them to go on and execute the trust, and account to the heirs when they became of age. The report of the master upon that reference having been confirmed, that accounting, so far as it goes, must be considered final between the parties. But the defendants cannot take the legacies, which were evidently intended as a remuneration in part to them for the execution of their trust under the will, and abandon the trust. As they have been guilty of no misconduct or breach of trust, they are entitled to the costs of defending this suit and of taking the account, to be paid out of the fund. The injunction must be dissolved and the receiver discharged; and he must account with and pay over to the defendants the balance, if any in his hands, and deliver to them all property which has come to his possession. In case of disagreement, his accounts must be passed before a master residing in the county of Jefferson. The decree must direct the defendants to proceed and execute the trust according to the directions of the will, and to distribute the property among the complainants when they become of age, respectively, retaining out of the share of each one third of the costs of this suit. It must reserve to the complainants the right to apply to the court for further directions as they shall be advised, if they cannot settle the estate amicably with the executors; but the account, as far as it has been taken, is to be conclusive upon both parties. The defendants are also to be at liberty to apply to the court from time to time as they shall be advised, for directions in relation to the execution of their trust; giving the usual notice of such application to the complainant who is of age or to

his sclicitor, and to the guardian of the infants. The right is also to be reserved to each of the complainants who are infants, at any time within six months after they come of age, and notwithstanding any acts done by them under the decree in this cause, to *apply to the court for such order and direction in relation to the costs, as between them and their next friend, as may be just.

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QUICK v. STUYVESANT.

Where one person conveyed land to another for the purpose of opening a street in the city of New-York, and there was no other consideration for the conveyance but the benefit which the grantor was to derive from the opening of the street, and by subsequent events beyond the control of both parties the street could not be opened, a re-conveyance of the land was decreed.

If a deed or obligation is sought to be enforced in an event not foreseen or provided for by the parties, and contrary to the original intention, a court of equity will interfere to prevent such injustice.

In such a case the court of chancery will direct that to be done which the parties would themselves have directed had they foreseen the event.

Where from any defect of the common law, want of foresight of the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to supply the defect or furnish the remedy.

But these principles, when acted on by the court of chancery, are subject to such limitations and restrictions as are necessary to protect the rights of bona fide purchasers and others who have superior equities.

In 1797, J. Quick owned a strip of land in the city of New-York, on the east side of the Bowery Lane, about 400 feet in length on the Bowery, and extending back 66 feet at the north end and 120 feet at the south. P. Stuyvesant, the father of the defendant, owned the Bowery farm, lying north and east of Quick's land, and extending back to the East River. In order to lay out this farm into city lots, by streets running through it in different directions, Stuyvesant made an arrangement with Quick

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by which the latter consented to have Quick-street run through the middle of his lot and the Bowery farm, from the Bowery Lane to the East River, and to have Rensselaer-street run parallel therewith, taking a small part of the south end of Quick's lot. Quick was to have two small pieces of the Bowery farm on Quick-street in rear of his lot, and was to give Stuyvesant a small piece of his lot at the north end fronting on the Bowery Lane, and another small piece in the rear of the south end, *bounded southerly by Rensselaer-street. By this arrangement Quick would have three corner lots on the Bowery Lane and on Quick and Van Rensselaer-streets, and would obtain a lot in the rear of his land, fronting on Quick-street, in lieu of the land which was to be taken for the streets, and that which was relinquished to Stuyvesant at the north end. For the purpose of carrying this arrangement into effect, a diagram was made showing the location of the contemplated streets, and dividing the whole land into building lots, which were marked and numbered on the map. Quick then conveyed the whole of his land to Stuyvesant, and the latter immediately re-conveyed to him the several lots which were intended to be retained by him, and also the additional lot in the rear, fronting on Quick-street. In 1805, P. Stuyvesant died, and by his will he devised the property in question and the whole of the Bowery farm to the defendant in fee. Before the streets were opened, the act of the 3d of April, 1807, (sess. 30, ch. 115,) was passed, which prevented their being opened as contemplated by the parties. Under this act the commissioners laid out the Third avenue, which left the Bowery a little south of Quick-street, and took off about one half of the three lots of Quick north of that street. The commissioners also laid out Fifth-street, which leaves the Bowery Lane precisely where Quick-street did, but running in a more southerly direction to the East River, takes off about one half of the two lots fronting on the Bowery south of Quick-street, and a lot out

two thirds of the lot immediately in rear thereof. They also laid out Fourth-street, which commenced at that part of the Bowery where Rensselaer-street did, and runs parallel with Fifth-street.

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In 1815 J. Quick died intestate, leaving the complainant and his brothers, William and Abraham Quick, his heirs at law. In 1816 the three brothers made partition between themselves of the lands of their father; in which partition all the land north of Fifth-street was conveyed to William, the middle part south of Fifth-street was conveyed to the complainant, and the southerly part to Abraham, including the land which was originally intended to be covered by Rensselaer-street. In 1826 Abraham *conveyed his share to the complainant. In 1824 the defendant and the heirs of William Quick compromised as to the claim made of the land originally intended for Quick-street which is not included in Fifth-street; and mutual releases were executed in pursuance of that arrangement. In 1827 Fourth-street was opened, and the same year the complainant erected a dwelling house at the corner of Fourth-street and the Bowery, upon land formerly owned by J. Quick, part of which was the land originally intended for Rensselaer-street. While the complainant was erecting his house, the defendant forbid his building on that part of the land which was originally intended to be included in Rensselaer-street, and finally commenced an ejectment suit to recover possession thereof. The complainant thereupon filed his bill in this cause for an injunction, and to obtain a re-conveyance of that part of the premises. The cause was submitted on pleadings and proofs.

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J. Platt, for the complainant. From the facts in this case it appears, that Peter Stuyvesant and Jacobus Quick made an agreement and adopted a plan for laying out streets in a particular manner which suited their interest; and that the government then interposed and broke up

1820. their arrangement, and prohibited forever the streets
 Quick which they had so designed and agreed on. The agree-
 v. ment was in fieri, when the hand of government was laid
 Stuyvesant. upon it. By that act of the government, and not by any
 act or default of his own, Quick lost the benefit of the
 contemplated streets; and it is contended on the part of
 the complainant, that equity requires a reconveyance of
 the ground which was conveyed to Petrus Stuyvesant, for
 a consideration which has failed.

[*87] Agreements not fraudulent "will be relieved against on
 the ground of inequality, an imposed burden or hardship
 on one party to a contract, which is considered a distinct
 head of equity, being looked upon as an offence against
 morality and as unconscientious." (2 Powell on Con. 145,
 146.) In this case there was no fraud imputable to Mr.
 Stuyvesant; but it was evidently an unequal bargain ac-
 cording to the *legal rights of the parties; and the defend-
 ant now makes an unconscientious use of it, in an event
 not contemplated by the contracting parties. "In every
 well constituted government there is somewhere lodged a
 power of supplying that which is defective, and control-
 ling that which is unintentionally harsh in the applica-
 tion of any general rule to a particular case." (1 Fonbl. Eq.
 6, note c.) "Where there would be a failure of justice
 by the rules of conscience, equity is bound to interpose
 and supply the defects of the law." (Grounds and Rudi-
 ments of Equity, page 75.) So "equity will relieve
 against one's own act according to circumstances." (Id.
 96.) "Courts of equity, not suffering a right to be with-
 out a remedy, interfere in all cases in which the right is
 clear, but from want of particular evidence is unavailable
 at law." (1 Fonbl. Eq. 154, note f.) In *Newton v. Rouse*,
 (1 Vern. 460,) it was decreed that 100 guineas, part of an
 apprentice's fee, be paid back to the father of the appren-
 tice, his master having died within three weeks after
 sealing the articles. The case of *Underwood v. Stuyve-*
 sant, (19 John. R. 181,) contains no principle adverse to

the equitable claim of Quick. The court there say, "the *casus foederis* has not occurred, and the parties are mutually absolved from their contract in relation to the streets," &c.

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The original agreement was, that the ground marked on the maps for Quick-street and Rensselaer-street, should be devoted as streets; and the conveyances between the parties were designed to carry that object into effect. The legislative power which has been exerted over the subject, could not be foreseen by the contracting parties. They contemplated the usual course by which the corporation were in the constant habit of adopting streets voluntarily opened and dedicated by the proprietors. But suppose it had occurred to the minds of the parties, or the question had been put, what shall be done in the event that the corporation or the government should prohibit these streets from being opened? Can it be reasonably supposed that Jacobus Quick would have consented, or that Petrus Stuyvesant would have had the conscience to insist, that he should hold for his own use in **fee simple* the ground thus conveyed to him by Quick for the intended streets without compensation?

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If the act of 3d April, 1807, had not passed, there can be no doubt that equity would have compelled Mr. Stuyvesant to open the contemplated streets (Quick and Rensselaer) whenever the corporation or the government were ready to adopt and sanction them as public streets. That act has forbidden them to be opened; and shall this exercise of sovereign power so enure to the benefit of Mr. Stuyvesant as to give him the land which the parties agreed to devote for those streets? Shall Quick not only lose the expected benefit of those streets, but lose his land also, without any equivalent? Shall Quick's deed to Stuyvesant for the streets stand, and become absolute for the exclusive benefit of the grantee, after the only object of the grant has been thus defeated?

The motives and consideration which induced Jacobus

1830. Quick to make the agreement were the advantages of three corner lots, and the benefit of fronting on the two contemplated streets; and as to these, the consideration has utterly failed. But Mr. Stuyvesant is equally well accommodated by Fourth and Fifth streets, laid out by the commissioners: he has lost nothing, has made no sacrifice; and he now seeks to appropriate to his own use the ground which Mr. Quick gave for the use of streets, which a subsequent law has forbidden to be opened.

The damages allowed by law for opening new streets do not include injuries arising from breach of contracts, or from failure of consideration in a deed. The appraisers had no jurisdiction to inquire into the equities of this case; and so far as Fourth-street cut off a small part of the gore now in dispute, compensation (it must be presumed) was allowed to the defendant, he having the legal title to it.

The objection for want of parties, is not well founded; but even if new parties are necessary, the present bill is sufficient for the immediate purpose for which it was filed, to wit, to stay the ejectment at law; and the bill ought to be retained for that object till new parties can be introduced by amending the bill.

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**P. A. Jay*, for the defendant. The court, after a lapse of thirty years, will not set aside solemn conveyances, when all the parties to them have long since died, merely upon conjecture concerning the inducements of the parties, without any pretence of mistake, and without any allegation of fraud.

The defendant and those under whom he claims, have been in possession more than thirty years. This is a bar even to a writ of right. The complainant could have no right of entry, nor could he lawfully enter upon the land he claims and erect a house upon it, without previously establishing his title in some court of law or equity.

If the complainant succeeds, it must be upon the

ground, 1. That the consideration has failed; or, 2. That Mr. Stuyvesant held the streets in trust to open them, or if that could not be done, to re-convey them to Quick.

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1. How does the court know what were the considerations or inducements of Jacobus Quick in making this conveyance? Can the court guess them from the circumstances of the transaction, or from the valuation of the lands made by witnesses who testify to the value of lots thirty years ago? Can a decree of this court be founded upon guesses? Can the court divide the consideration of the conveyances, and say that the ground conveyed to Quick was the consideration for that conveyed to Stuyvesant, and that there was no consideration for the streets? Can the court be sure, or indeed can it be believed that Stuyvesant would have conveyed the lots at all, if he had not received a conveyance for the streets? Yet it is contended by the complainant that the streets ought to be re-conveyed, and that he should retain all the land conveyed by Stuyvesant.

But even supposing that the consideration has failed, will that authorize the court to decree a re-conveyance? Suppose the title to the land conveyed by Stuyvesant had failed, in that case, Quick would have had a remedy upon the covenants in his deed; but we submit that his own conveyance could not have been rescinded.

Again, the lapse of time is an effectual bar. "If the equitable title be not sued upon within the time within which a *legal title of the same nature ought to be sued upon to prevent the bar created by the statute, the court acting by analogy to the statute will not relieve." (*Bond v. Hopkins*, 1 Sch. & Lef. 429. *Stackhouse v. Barnston*, 10 Ves. 466. *Dewdney, ex-parte*, 15 id. 496.)

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2. Did Stuyvesant take as trustee? The deeds contain no declaration of trust; no covenant relating to the streets; nothing from which a trust can be inferred. There is no evidence that any trust was undertaken. Is it possible, then, that the court can decide first that there

1830. was a trust, and next define what it was? Even if the
 Quick deed had contained an express covenant to open the
 v. streets, the law of 1807 rescinded that covenant. (*Brew-*
 Stuyvesant. *ster v. Kitchin*, 1 Ld. Raym. 317.) But the lapse of time
 will still be a bar, even if a trust should be implied.

It is true, that the case of a trustee is an exception to the rule stated above. But then the exception only extends to an avowed technical trustee; not the case of a trust fixed upon a man against his will, by implication of law, for the sake of the remedy. (*Townshend v. Townshend*, 1 Cox's Ch. C. 34. S. C. 1 Brown's Ch. C. 551. *Decouche v. Savetier*, 3 John. Ch. R. 216.)

3. But the original conveyances cannot be rescinded in part only; so that the complainant is to retain all that was conveyed to his father, and receive back what his father conveyed to Stuyvesant. If the conveyances are rescinded at all, they must be in toto. The parties must be restored to their original situation, for no fraud is imputed to Stuyvesant. But it is impossible to rescind the whole transaction upon this bill.

The complainant, in 1816, conveyed away to William Quick all his title to a part of the land contained in the deed executed by Stuyvesant. It is no answer to say that afterwards, in 1824, some of the children of William Quick purchased Quick street from the defendant. The complainant is unable to re-convey the land which his father received, and therefore cannot rescind the transactions by means of which it was received.

The complainant's bill ought to be dismissed, with costs.

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*THE CHANCELLOR. From the admissions in the answer, and the testimony in this cause, there can be no doubt as to the intentions and object of P. Stuyvesant and J. Quick at the time the conveyances of April, 1797, were executed. It was not the intention of either party to vest the title to the land included in Quick and Rensselaer streets absolutely in Stuyvesant for his own use, or for any

other purpose than that of opening a street over the same for the mutual accommodation of both parties. For the lands which Quick acquired under that arrangement, Stuyvesant received a full equivalent in the two pieces, at the north end and on the rear of the south end of Quick's land, which were conveyed to him for his own use. From the situation and value of the property, it is not probable that Quick would have consented to an exchange of lands, even to that extent, if he had not contemplated a greater benefit to his remaining property by the opening of the proposed streets. The particular mode in which the parties attempted to carry into effect their arrangement cannot alter their equitable rights, although the legal title to the land intended for the streets became thereby vested in Stuyvesant. If the manner of conveying had been reversed, and the legal title to the streets, through the Bowery farm to the East river, had been vested in Quick for the same object, the injustice of retaining that portion of the land for other purposes might have been more apparent; but the equity of the case would have been the same. The event which has happened was not contemplated by either of the parties at the time, and therefore was not provided for by their agreement. By an act of the government over which they had no control, the parties were prohibited from laying out and opening the contemplated streets. If such an event had been foreseen, it would unquestionably have been provided for in the conveyances. Courts of common law cannot supply defects of will, or rectify mistakes in written agreements or conveyances. Hence, with respect to matters of this kind, results the necessity of a court of equity, which, authorized by the principles of justice, ventures to correct words by circumstances, and to supply omissions in will, by conjecturing what would have been the will of the parties had they foreseen the event. This, in *law language, is to judge according to the presumed or implied will of the parties; not that any will was interposed, but

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1830. only that equity directs the same thing to be done which
 Quick it is probable the parties themselves would have directed
 v. had their foresight reached so far. (Kaimcs' Prin. of Eq.
 Stuyvesant. 40.) Thus in *Newton v. Rouse*, (1 Vern. 460,) where a
 father articted his son to an attorney, and gave £120 with
 him, and the attorney died within three weeks thereafter,
 the executors of the latter were decreed to refund 100
 guineas to the father. Every man who makes a covenant
 or executes a deed has an object in view which he pro-
 poses to accomplish by means of the covenant or deed.
 They sometimes fall short of the end or object which was
 intended, and sometimes go beyond it. If the end pro-
 posed is lawful, a court of common law only inquires
 what acts of will were really exerted; and the deed or
 covenant is made effectual without regard to consequences.
 But courts of equity are more at liberty to follow the dic-
 tates of refined justice. They consider every deed in its
 true light, as a means employed to bring about some
 event; and in this light they refuse to give it force any
 farther than is conducive to the proposed end. In all
 matters whatever as well as in matters of law, the end is
 the capital circumstance; and the means are regarded so
 far only as they contribute to that end. Where a deed
 or obligation is sought to be made effectual in an event
 which is unexpected to both parties, a court of equity de-
 nies its authority. The party seeking to enforce it is un-
 just and inequitable in his demand, and this furnishes a
 valid objection for the adverse party. (Kaimcs' Prin. of
 Eq. 80, 81, 94.) These principles are constantly acted
 upon by this court, subject to such limitations and restric-
 tions as are necessary to protect the rights of bona fide
 purchasers and others who have superior equities. Where,
 from any defect of the common law, want of foresight of
 the parties, or other mistake or accident, there would be
 a failure of justice, it is the duty of this court to interfere
 and supply the defect or furnish the remedy.

In this case, if the street had been laid out and opened

as originally intended by the parties, Quick would have had three valuable corner lots fronting on the Bowery Lane. By *the arrangement of the commissioners, two of them would have been destroyed or materially injured if the land appropriated for Quick and Rensselaer streets was not restored to him. While on the other hand, Stuyvesant's property would be equally benefited by the new streets as by those originally determined upon in 1797. The whole object of the conveyance of the land included in the streets, as well as the cause and consideration of that part of the conveyance having failed, justice and fair dealing evidently require a reconveyance of that land to the heirs of Quick. If the rights of the parties had not changed in other respects, perhaps the heirs of Quick might have insisted upon a re-exchange of the other lots. This however would present a case of more doubt; as there was a consideration, though as it turned out an inadequate one, for the exchange of lots. But that question cannot now arise, as it is put at rest by the compromise between the defendant and the heirs of William Quick. The only matter now in dispute relates to the land in Rensselaer street, in relation to which no persons except the parties in this suit have any claim or interest. This also disposes of the objection raised by the defendant's counsel, that all the proper parties were not before the court.

The remedy of the complainant is not barred by a lapse of time. Previous to the decision of the commissioners in 1811, Quick had no right to ask for a conveyance, as it could not be known before the plan of the city was completed and filed that they would not adopt the location of the streets as made by the parties in 1797. I do not understand that there has been any adverse possession, strictly speaking, since that time. The property was occupied together until the opening of the streets and avenue, in 1824. The heirs of Quick asserted their claim to these lands by their partition deeds in 1816. The right of the complain-

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1830. ant to the strip of land now in controversy was again as-
 Ames asserted in 1826, and by the subsequent erection of a house
 v. thereon. I do not notice the allegation in the answer, that
 Blunt the defendant paid the assessment on the strip of land in
 dispute for the expense of laying out and opening Fourth
 [*94] street, as it does not appear to *be responsive to the bill,
 and the defendant has made no proof of the fact.

The result of my investigation in this case is, that the complainant is entitled to a reconveyance of the premises in controversy, north of and adjoining Fourth-street, which formerly belonged to Johannes Quick, and to his costs in this suit to be taxed. And the injunction heretofore granted in this cause must be made perpetual.

AMES v. BLUNT AND OTHERS.

Practice, under the revised statutes, as to removing causes from a vice chancellor to the chancellor before hearing, and as to referring causes and motions to a vice chancellor for his decision.

If a cause commenced before a vice chancellor is directed to be heard by the chancellor, the whole cause is before the chancellor; and all orders and decrees thereafter made by him are to be entered with the register or assistant register.

Where the chancellor holds a term of the vice chancellor's court, the orders and decrees made by him are to be entered with the clerk of the vice chancellor.

Where the vice chancellor has been counsel in a cause pending before him, or is otherwise legally incompetent to decide the same, or any motion or petition in the cause, the chancellor may direct the same to be heard before himself, or he may refer the same to the vice chancellor of any other circuit.

When a cause pending before the chancellor is in readiness for a hearing, either party may apply for leave to have it heard before a vice chancellor.

The petition for such reference should state the situation of the cause; and notice of the application must be given to the adverse party.

If a greater number of causes are placed on the calendar of the chancellor or submitted to him, than he can hear and decide, he will, without any application from either party, refer such causes as he thinks proper to the vice chancellors.

CASES IN CHANCERY.

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Principles on which selections of causes for the decision of vice chancellors will be made.

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Where the order referring a cause to a vice chancellor to hear and decide the same is general, the whole cause is before him, and all subsequent orders and proceedings therein are to be made and had before the vice chancellor.

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Where some particular motion or branch of a cause only is referred to a vice chancellor, the general proceedings in the cause must continue to be had before the chancellor.

If a special motion or other special application is referred to a vice chancellor for his decision, the chancellor may at the same time direct that all other proceedings and questions in the cause be had and heard before such vice chancellor.

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The suit was originally commenced before the chan- March 18th.
cellor, who from the press of business before him not having time to hear the same, referred it to the vice chancellor of the first circuit, to be heard and decided by him, with liberty to either party to bring the same to a hearing at the next or any subsequent term of such vice chancellor's court, on the usual notice. A question having arisen before the vice chancellor as to his jurisdiction and powers under the order of reference, it was submitted to the chancellor for his decision. He thereupon delivered the following opinion :

THE CHANCELLOR. The question immediately before me does not call for the consideration of all of the provisions of the revised statutes as to the jurisdiction, powers, and duties of the several officers of this court. It may, however, be useful, and save much litigation and expense, at once to examine and settle the construction of these various provisions. By the constitution, the powers of this court are vested in the chancellor as the supreme judge thereof. These powers cannot be taken from him by any act of the legislature ; neither was it intended to be done by any provision of the revised statutes. Independent of the provision in the fifth section of the fifth article of the constitution, the legislature may direct the

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appointment of other officers of this court to perform such subordinate duties therein as shall from time to time be found necessary for the more convenient administration of justice. And by that special provision of the constitution, they are expressly authorized to vest those subordinate powers and duties in the circuit judges, *ex officio*.

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The relation which the several vice chancellors bear to the chancellor under the revised statutes, is substantially the same as that which the master of the rolls and vice chancellor of England bear to the chancellor there. The master of the rolls has concurrent power with the chancellor to hear and determine originally the same causes and matters *as the chancellor; except in lunacy and bankruptcy, which in England do not belong to the court but to the chancellor in person. This is substantially the same jurisdiction as that conferred upon the circuit judges in their several circuits under the second section of that title of the revised statutes which relates exclusively to this court. (2 R. S. 168, § 2.) The office of vice chancellor, in England, was created by the act of the 23d of March, 1813. (Statutes at large, ch. 24.) He is authorized to hear and determine all causes and matters pending in the court of chancery as the lord chancellor shall from time to time direct; but he cannot reverse, alter, or discharge any decree or order made by the master of the rolls or of the lord chancellor, without the special authority of the latter. This is the same power conferred upon the circuit judges by sections four and six of the title of the revised statutes before referred to, and subject to the same restriction which is found in the third section. The powers and duties of masters and examiners are also conferred upon the vice chancellors in certain cases. (2 R. S. 169, § 5, 6; 180, § 84, 85; 626, § 8.)

When the proceedings are originally commenced before a vice chancellor in a case where he has jurisdiction under the second section, he has as full power as the chancellor himself to hear and finally decide the cause; and to en-

force the performance of any order or decree therein, and to revise and correct the proceedings of any inferior officer of the court. But all decrees and orders made by him are subject to be reversed, discharged, or altered by the chancellor, on appeal. (2 R. S. 177, § 57.)

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Where a cause commenced before a vice chancellor is in readiness for hearing, the proceedings may be removed and the cause heard before the chancellor in person, whenever from the difficulty of the case or for any other reason the latter may think proper so to direct. (2 R. S. 178, § 63.) If a cause is brought before the chancellor under this provision of the revised statutes, the whole case is before him. The orders and decrees made therein by the chancellor are to be entered with the register or assistant register. And all subsequent proceedings are to be before the chancellor, *unless by his order the cause is again remitted to the vice chancellor. But where the chancellor or the vice chancellor of another circuit holds the stated term of a vice chancellor, as authorized by the fifty-third section, (2 R. S. 177, § 53,) the order or decree is to be entered as having been made by the chancellor, or substituted vice chancellor, holding the stated term of the vice chancellor of the particular circuit where the proceedings were pending. And it must be entered in the office of the clerk residing in such circuit. In such cases the subsequent proceedings in the cause will remain, and be continued before the vice chancellor of that circuit. The fifty-third section has made no provision for the hearing and deciding of a special motion, or other collateral application in the cause, in vacation. Nor does it provide for a case where it would be inconvenient for the chancellor or the vice chancellor of another circuit to hold the stated term of a vice chancellor who had been counsel in the cause, or who for any other reason could not hear and decide upon the motion or other application. In such cases there can be no doubt of the right of the chancellor to direct the motion or application to be made before

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1880. himself. And under the general power given by the
 Ames sixth section, (2 R. S. 169, § 6,) he may authorize the
 v. same to be heard and decided by the vice chancellor of
 Blunt any other circuit, at such time and place as will be most
 convenient to such vice chancellor and to the parties in
 the cause.

The fourth section of this title provides that the hearing and decision of any motion or of any cause set down for hearing before the chancellor, may be referred by his order to any vice chancellor, subject to the appellate jurisdiction of the chancellor, (2 R. S. 169.) The practice of entering an order and setting down a cause for hearing was abolished by the rule of the fourth of August, 1828. By the former practice an order to set the cause down might be entered at any time after the cause was in readiness for hearing. The proper construction of that part of the section therefore is, that either party may apply to the chancellor, as soon as the cause is in readiness, for leave to bring the same to hearing before such vice chancellor as may be most convenient *to the parties or their counsel and who has sufficient leisure to hear and decide the cause. The petition on which such application is founded should state the nature of the suit, and show that it is in readiness for hearing, either upon bill and answer, plea or demurrer, or on pleadings or proofs, or otherwise. And due notice of the application must be given to the adverse party. If the parties neglect to make such application, and more causes are placed upon the calendar of the chancellor than he is able to hear and decide, he will, without the request of either party, refer such causes as he is unable to hear in person to such vice chancellor as is most convenient. Under this provision of the revised statutes, the chancellor will retain such causes to be heard before himself as, from the nature of the litigation or the amount in controversy, will be likely to be carried up by appeal; and also such causes as have been partially examined by him on the merits, upon motion to dissolve as

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injunction or otherwise. Mortgage cases and other causes in which there is no real litigation, and which are entitled to a preference by being placed in either of the three first classes on the calendar, will not be referred to a vice chancellor unless some special reasons are shown which may render such reference necessary.

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When the order referring the cause to a vice chancellor to hear and decide the same is general, the whole cause is to be considered before the vice chancellor, as fully as if the original proceedings had been commenced before him; subject to the restrictions which are contained in the third section. And all motions, petitions, and other questions which are subsequently made or presented, or which may arise in the cause, must be heard and decided by the vice chancellor, unless otherwise specially directed in the order of reference. But where a special motion or petition, which only relates to some collateral matter or particular branch of the cause, is referred to a vice chancellor to hear and decide thereon, the cause still remains before the chancellor. Every proceeding which is necessary or proper to enable the vice chancellor to decide the particular matter referred to him, may be done under his order or direction. He may therefore direct a reference to a master to ascertain facts, make an order for the production of books and papers, &c., *and may enforce the observance of any such order made by him, in the same manner as if the whole case was before him. As to every other branch of the cause, the proceedings must still be had before the chancellor, as if no such reference of the particular matter had been made.

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Even in these cases of the reference of a motion or other special application to a vice chancellor, the authority given to the chancellor by the sixth section is sufficiently extensive to enable him to direct all other questions and proceedings in the cause to be had and heard before the vice chancellor to whom the particular

1880. matter is referred. In such a case a special provision to
 Duncan that effect may be inserted in the order of reference.
 v. This cause having been referred generally to the vice
 Dodd. chancellor of the first circuit to hear and decide the same,
 all special motions and other proceedings therein, while
 the cause remains with him, must be made and had be-
 fore the vice chancellor

DUNCAN AND OTHERS, TRUSTEES, v. DODD AND OTHERS.

The biddings at a master's sale will not be opened except in very special cases, and then it will not be done unless the purchaser is fully and liberally indemnified for all damages, costs and expenses to which he has been subjected.

Where property which was the only estate belonging to two infant children had been sold under a decree of foreclosure, for half its value, to satisfy a debt nearly equal to the amount of the bid, a re-sale was ordered upon security being given that the premises should produce fifty per cent. advance upon such re-sale, and that the interest on the whole purchase money should be paid to the purchaser, together with all the reasonable costs and expenses which he had paid in consequence of the purchase, or to which he had been subjected, either in opposing the application for a re-sale or in investigating the title to the premises.

March 17th. THIS was an application for the re-sale of mortgaged premises in the city of New-York. The property belonged to infant defendants, subject to the right of dower of their mother. The amount due on the mortgage, exclusive of costs, was less than \$1700, and the premises were struck off to Turner the purchaser for \$2025. Turner went into possession by permission of the master, and
 [*100] *paid ten per cent. on the purchase money; but the decree not being enrolled, no conveyance had been executed. The mother and stepfather of the infants, as soon as they heard of the sale, applied to the purchaser to relinquish his purchase, offering to indemnify him for his expenses, but he declined their offer. The petitioners stated in

their petition that the sale had been a surprise upon them, that the property was worth more than \$4000, and they offered an advance of fifty per cent. on the purchase, for the benefit of the infant defendants. The application was opposed by the purchaser, who stated among other things that before he had any notice of the intention of the petitioners to apply for a re-sale, he had agreed to rent the property, for two years from the first of May next, to the tenant who is now in possession thereof.

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W. Silliman, for the petitioners.

J. Leveridge, for the purchaser.



THE CHANCELLOR. By the practice of the English court of chancery it is almost a matter of course to open the biddings on a master's sale, before the confirmation of his report, upon the offer of a reasonable advance on the amount bid, and the payment of the costs and expenses of the purchaser. As a general rule, an advance of ten per cent. is sufficient to authorize a re-sale. (*Gars-ton v. Edwards*, 1 Sim. and Stu. 20.) But the biddings will not be opened where the amount of the advance is less than £40. (*Farlow v. Wieldon*, 4 Mad. Rep. 460.) The English practice as to opening biddings has not been adopted in this state, and it is probably not desirable that it should be introduced here. In *Williams v. Attleborough*, (Turner's Rep. 75,) Lord Eldon says, "During a period of nearly half a century which I passed in this court, and in which Lord Apsley, Lord Thurlow, the Lords Commissioners, with Lord Loughborough at their head, then Lord Loughborough as chancellor, and after him the Lords Commissioners, with Chief Baron Eyre at their head have presided here, I have heard one and all of them lament that the practice of opening biddings was ever introduced. I confess that I have great doubts myself upon the subject; but after a practice so long

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established, it is not for me to disturb it." If such are the opinions of English chancellors as to the dangerous tendency of the practice in that country where real estate has, comparatively, a fixed and certain value, a re-sale ought not to be granted here except in very special cases. In the city of New-York, real estate when sold by a master under a decree or order of this court generally produces its fair value. It is therefore essential to the interests of those whose property is thus sold, that purchasers should continue to retain full confidence in the safety of such purchases; and that they will not, as a matter of course, be disturbed merely because a good bargain has been obtained. And when the court is obliged to order a re-sale of property purchased in good faith, the former purchaser must be fully and liberally indemnified for all damages, costs and expenses to which he has been subjected.

In *Williamson v. Dale*, (3 John. Ch. Rep. 292.) Chancellor Kent permitted a re-sale, on grounds which were certainly not stronger in favor of the application than those which are here presented. The property in this case is the sole dependence of two infant children, and has been sold for half its value to pay a debt a little less than the amount of the purchase money. The property was sacrificed, either through the misapprehension, or negligence, of their mother and stepfather. Immediately after they heard of the sale they made the application to the purchaser to let them redeem the property for the benefit of the infants, and they now offer an advance of more than one thousand dollars on the former bid. If the defendants were adults, and the property had been sacrificed by their own negligence or inattention, I should not disturb the sale; and now it can only be done on condition that a full indemnity is offered to the former purchaser. The fact that he has agreed with the former tenant of the premises to rent the same to him for two years from May next, does not stand in the way of a re-sale. If it is a mere verbal agreement under which nothing has

been done to change the rights of the parties, it is not valid under that provision of the *revised statutes which requires all leases for more than one year to be in writing. (2 R. S. 135, § 8.) But if the agreement is valid, the property must be put up and sold, subject to the rights of the lessee.

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v.
TOMPKINS.

If, within ten days, the petitioners, or any other person in their behalf, give sufficient surety to the satisfaction of the master, that the premises shall actually produce fifty per cent. advance upon a re-sale, or if they deposit with the master within that time the fifty per cent. advance offered by them, he must put up the property again and re-sell the same upon such notice as he may deem reasonable, not less than one week. In that case the master is to pay to the former purchaser, out of the amount of such advance, the interest of his deposit and of the whole purchase money which he has kept on hand, together with all reasonable costs and expenses which he has paid or been subjected to in opposing this application, or in investigating the title. The property must also be sold, subject to any rights which the present tenant may have under the alleged agreement with Turner.

MINTHORNE'S EXECUTORS v. TOMPKINS' EXECUTORS.

Where the decree is full as to any branch of the cause, or as to any of the parties thereto, it must be enrolled before a deed can be executed on a sale under the decree, and before an execution can be issued to enforce a performance of such decree.

If the enrolment of any subsequent decree is necessary, it is to be made by a continuance on the record of the first enrolment.

THE CHANCELLOR decided that the 111th rule did not apply to the case of a sale under an interlocutory order of the court; that in such a case, the deed might be executed before enrolment. But if the decree was final as to March 20th.

1880. the whole subject matter of the sale, that it must be enrolled before any conveyance could be executed; although, as to other branches of the suit, another decree might be necessary before the cause was finally disposed of by the court. And that if a bill was dismissed with costs as to one defendant, the decree must be enrolled *before any execution could issued thereon. And that the enrolment of any subsequent decree between other parties, or as to other matters, must be made by a continuance on the record of the first enrolment.

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THE PEOPLE EX REL. LOVETT v. ROGERS.

Manner of proceeding where a defendant is brought into court on an attachment for a contempt.

Where, from the answer of the parties to the interrogatories filed, it appeared that he was in contempt for refusing to obey an order to deliver over certain property to a receiver, he was ordered to be committed to close custody until he complied with the former order of the court and paid the costs of the proceeding.

The costs which the party is bound to pay must be specified in the order of the court and in the mittimus.

Form of an order of commitment for a contempt.

Where a party perseveres in his refusal to deliver over property to a receiver, the property may be sequestered, and his servants and agents, &c. will be prohibited from delivering it to him or applying it to his use on pain of contempt.

March 20th THE defendant in this case was brought up on an attachment for a contempt in not complying with an order of the court directing him to deliver over his property upon oath to a receiver. The prisoner being in the custody of the sheriff of the city and county of New-York in execution on civil process, a habeas corpus was issued to bring him into court. Upon the prisoner's being brought before the chancellor, an order was entered directing the relators to file interrogatories in relation to the contempt

specifying the facts and circumstances alleged against the defendant, and to serve a copy thereof upon him ; and that the defendant put in written answers thereto upon oath, and file the same with the register within twenty-four hours thereafter. In the mean time the sheriff was directed to detain the defendant in custody, and attend with him from day to day before the chancellor, until the further order of the court. The defendant having put in his answers to the *interrogatories, the parties were heard before the chancellor by their counsel in relation to the alleged contempt.

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H. Bleeker, for the relators.

E. M. Blatchford, for the defendant.

THE CHANCELLOR decided that the defendant was in contempt; and, as it appeared he was a prisoner in execution on civil process, that he must be remanded to the prison in New-York, on the habeas corpus ; that for the contempt he must be committed to the common gaol of the city and county of New-York, and be confined therein, in close custody, until he complied with the former order of the court and paid the costs and expenses of the proceedings in relation to the contempt. (2 R. S. 583, § 23 ; 755, § 7.) And a process of commitment was directed to be issued under the seal of the court.

The order recited the former order of the court and the proceedings thereon ; showing the contempt of the defendant, the issuing of the attachment and habeas corpus, and the proceedings thereon ; the adjudication of the court that the defendant was guilty of a contempt in neglecting and refusing to obey the former order, and that such misconduct of the defendant was calculated to and did actually impair, impede and prejudice the rights and remedy of the relators in their suit. The order then directed the defendant to be committed to the common gaol of the city

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and county of New-York until he should comply with the former order of the court, (specifying particularly what was to be done,) and pay the costs of the proceedings; and that a process of commitment issue accordingly.

The chancellor also decided that the costs of the proceedings should be taxed immediately; and that the amount thereof must be specified in the order and mittimus. He also decided that the relators might have an order, in the original cause, to sequester the property and effects of the defendant and deliver them over to the receiver; and to prohibit all persons who had any such property or effects in their possession or under their control, or who were indebted *to the defendant, from delivering the said property or effects or paying such debts to him or to his order, or applying the same to his use after publication of notice of the order on pain of contempt.[1]

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[1] The S. C. will not grant a mandamus to compel an inferior court to punish a man for contempt, unless the civil rights of an individual are implicated in the proceeding. *Ex parte Chamberlain*, 4 Cow. 49. When this is not the case, every court must be the judge whether a contempt has been committed against it. *Ib.* To bring a party into contempt for non-payment of costs, the rule should be entered expressly directing him to pay costs. *Anon.* 4 Cow. 357. Practice as to taking bail on recognizance upon arrest by attachment for contempt. *The People v. Telft*, 8 Cow. 340. A defendant being arrested by attachment for a contempt merely technical, and offering to give bail for his appearance, but the sheriff declining to go with him before a judge for this purpose, and having appeared and answered interrogatories, was discharged on payment of costs, not including the sheriff's fees for attendance upon the attachment. *Ib.* The sum for the non-payment of which a commitment is ordered, need not be named in the order, but may be ascertained through a reference thereby directed to the proper officer; and the officer's report when perfected, though made after the order, is to be regarded as a part of it. *The People ex rel. Johnson v. Nevins*, 1 Hill, 154. The jurisdiction of courts of record as to the person, in cases of commitment for contempt, is to be intended. *Ib.* A rule of a court of record that a defendant be committed for contempt, need not recite the prior proceedings; if it is such a rule as the court might legally make under any supposable state of circumstances, all jurisdictional steps and matters of regularity are to be presumed. *Ib.* Where A. B., who was a master in chancery, was committed by the chancellor, and the order of commitment stated that A. B., while he was a master, filed a bill

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to which he subscribed the name of C. D., one of the solicitors of the court, without his knowledge or consent, and prosecuted the cause in his name, contrary to the statute in such case made and provided, in wilful violation of his duty, as master, and in contempt of the authority of the court, and for the said mal-practice and contempt, the said A. B. was ordered to be committed to jail, there to remain until the further order of the court; it seems that the commitment is valid. *Yates v. Lansing, in error*, 9 J. R. 305. *Case of J. V. N. Yates*, 4 J. R. 317. *Contra, Yates v. The People, in error*, 6 J. R. 337. The supreme court has no power to discharge a person committed by the court of chancery for a contempt. *Ib.* Commitment until the further order of the court is good. *Ib.* It seems that the court of chancery may commit for a contempt, on the affidavits of witnesses only, without first putting the party to answer to interrogatories. *Ib.* If a judge in vacation on habeas corpus, discharge a master in chancery, committed by the order of the court of chancery, for mal-practice and contempt, the chancellor may re-commit the party for the same cause. *Ib.* It seems that a person who has been regularly committed by the chancellor for a contempt, and afterwards is improperly set at large, may be re-committed by an order of the court of chancery grounded upon and reciting the original warrant or attachment. *Ib.* A judge of the supreme court cannot discharge a person committed by order of the court of chancery on a conviction for a contempt of that court. *Ib.* It seems that the supreme court cannot discharge on habeas corpus, a person committed by the court of chancery for a contempt of that court. *Ib.* But see as to all these points *Yates v. The People*, 6 J. R. 337, which seems contra. *Ib.* Where defendant in chancery had become liable to conviction for contempt, by violating an injunction issued on a creditor's bill, and was afterwards discharged under the bankrupt act, and was after such discharge prosecuted by attachment for such contempt; it was held, that the discharge was no defence, and also that a fine to the amount of complainant's judgment and costs, with directions to pay the same to the complainant, for his indemnity, was proper. *Marcy v. Jordan*, 2 Denio, 570. Jurisdiction of the person once acquired, by arrest under an attachment for contempt, continues while the case is under examination, whether the defendant remain in actual custody or not. *The People v. Nevins*, 1 Hill, 154. Under a non-bailable attachment it is the duty of the sheriff to hold the defendant in custody till he is discharged in due form, bringing him before the court on the return of the writ. *Ib.* At common law, a rule for commitment, made by a court of record, need not show the cause of commitment; but the revised statutes require that it should. *Ib.* It is enough, however, that the cause be substantially stated, though without technical precision and the rule in this case, mentioning a previous order to pay money which the defendant had not complied with, sufficiently showed that the cause of commitment was for a contempt. *Ib.*

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DAVIS AND BROOKS v. MAPES AND OTHERS.

Where the defendant in his answer denies all knowledge of a fact charged in the bill, but admits his belief as to the facts charged, it is not necessary for him to deny any information on the subject.

The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or is necessary to substantiate his proceedings and make them regular.

The defendant must answer as to all facts within his knowledge, or which he can ascertain from an inspection of books and papers in his possession or under his control.

If the further answer which is called for by the complainant's exceptions can be of no possible use to him, the first answer is sufficient, and the exceptions cannot be sustained.

As a general rule, if the charge in the bill embraces several particulars, the answer should be in the disjunctive denying each particular; or admitting some and denying the others according to the fact.

April 5th

THIS case came before the chancellor on exceptions to a master's report, allowing certain exceptions to the answer of the defendant Mapes, for insufficiency.

J. Blunt, for the complainant.

G. Edwards, for the defendant.

THE CHANCELLOR. The first, second, sixth, seventh and eighth exceptions allowed by the master, all depend upon the same principle. The first relates to matters charged in the bill as having occurred between the complainants and other persons; as to which, it is not pretended the defendant Mapes has any knowledge, except from the information of others. The four last relate to judicial proceedings against another person, such as the issuing of a writ, the verdict given by a jury, and the judgment and execution founded thereon. *As to all these matters, the defendant answers, in substance, that he believes they are true as stated in the complainant's bill; but that he knows nothing as to those matters, except from what is set forth

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in the bill; and he craves leave to refer the complainants to the proof thereof.

It is insisted by the complainant's counsel that the defendant should have denied all information, as well as knowledge; or that he should have admitted that he had been informed thereof. And on this ground I presume the master allowed these exceptions. The true way to ascertain whether an allegation in the bill or an omission in an answer is material, is, to inquire whether a further answer, stating or admitting the fact in that manner which would be most favorable to the complainant, would be of any benefit to him. The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or to substantiate his proceedings and make them regular. Although he might prove the fact by other testimony, if it is within the knowledge of the defendant, or is contained in books or papers in his possession or legally under his control, the complainant is entitled to his answer as to that fact, to save the expense of other proof.

In this case the defendant admits his belief in the truth of the matters alleged. If he had admitted also that he had been so informed by the parties and their attorneys, but had denied all knowledge on the subject, and referred the complainants to the proof thereof, would they be in any better situation as to the proof of the fact than they are under the present answer? It is not necessary to decide, in this stage of the cause, whether the defendant's admission of his belief of the facts, under the qualifications therein contained, would be sufficient evidence thereof at the hearing. If further proof is necessary under the present answer, it would be equally so if he stated his information as well as his belief, and referring the complainants to proof of the fact. In *Amhurst v. King*, (2 Sim. & Stu. 183,) the defendant answered, "It might be true for any thing he knew to the contrary, that," &c., as in the bill: but that he was an utter stranger to all and

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every such matters, and could not form any *belief concerning them; and the answer was held sufficient. Here the defendant says he knows nothing of such matters, except from what is set forth in the complainant's bill. This is in effect denying that he has any other information concerning them. In *Jones v. Wiggins*, (2 Young & Jervis' R. 385,) one of the assignees of a bankrupt put in an answer, stating that his name had been used in the action at law without his knowledge or authority; that he had not acted as assignee, except in some trifling particulars not connected with the matters mentioned in the bill; that he was wholly ignorant of the matters therein stated, and could not make any other answer thereto as to his knowledge, belief, or otherwise. The lord chief baron assented to the proposition, as a general one, that a defendant answering was bound to answer fully; but he considered that no benefit could be derived from requiring a further answer in that case. And that a further answer would only be a waste of time and expense. The exceptions were therefore overruled, with costs. Upon the same principle the master should have overruled these exceptions.

The third exception relates to facts which may be material in the further prosecution of this cause. As the defendant has undertaken to answer those particular allegations in the bill, he should have answered them fully.

The fourth exception was properly allowed by the master. The defendant does not admit, or deny, that Coffin had the actual control of the goods; he believes he continued in possession, but denies that he had the legal control, because the execution was upon them. If he knew that the sheriff permitted Coffin to continue in possession and to have the actual control of the goods, he should have admitted the fact, instead of stating it as a matter of belief only. If he had no knowledge of the fact, he should have so stated it in his answer. It would then have been sufficient to state his belief, without an express ad

mission of the fact charged. The averment of legal control in the sheriff is a matter of law which the defendant may insist upon in his answer, but he must give a full answer as to all the facts charged, so that the court *may see whether he is right in his legal inference, and whether it can be available to him on the hearing.

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The fifth exception is also well taken. In this case the defendant has answered literally as to a charge in the bill, laid to be done with divers circumstances. He should have answered explicitly each distinct part of the charge: As whether Coffin did at any, and if at any, at what time between the issuing of the execution and the fire, sell the goods levied on, or any part thereof; and if any, what part; and whether the defendant, or the sheriff, had knowledge of the fact and permitted him to do so, or attempted to hinder him. And if he sold any goods, whether he accounted with, and paid over to the sheriff or to the defendant Mapes the proceeds thereof, or otherwise. The answer as it now stands is a negative pregnant, and the material part of the charge may be true. As a general rule, when the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular, or admitting some and denying the others, according to the fact. (1 Grant's Ch. R. 148. Hoffman, 263.)

The two first and the three last exceptions to the answer must be overruled. The master's report as to the third, fourth and fifth exceptions is confirmed, and the defendant must put in a further answer to them within twenty days after service of a copy of the order, or the bill may be taken as confessed. A majority of the exceptions referred not being allowed, neither party is entitled to costs on the reference. And neither is to have any costs upon the hearing of the exceptions to the master's report.

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L. WOOD v. C. WOOD.

On a bill for a divorce, if the wife is an infant, she must prosecute or defend by her next friend or guardian.

Where an infant defendant put in an answer to a bill of divorce, by her solicitor, the proceedings were, on her application, set aside for irregularity, and she was permitted to put in a new answer by her guardian.

Although the defendant denies the adultery charged in the bill, they may also set up the adultery of the husband or any other matter in bar of the suit.

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*Cohabiting with the wife after a knowledge that she has been guilty of adultery, will be such a condonation or forgiveness of the offence as to bar the suit for a divorce.

Forgiveness of the injury by implication, from the fact of cohabitation, ought not to be held a strict bar in all cases against the wife, as she is to a certain extent under the control of her husband.

The charge of adultery, whether by way of crimination or recrimination, should be stated in the pleadings in such a manner that the adverse party may be prepared to meet it on the trial of the issue.

The adultery must be charged with reasonable certainty as to time and place, and the name of the person with whom it was committed, if known, should also be stated.

If the name of the person with whom the adultery was committed, is not known to the party making the charge, that fact should be averred, and the time, place and circumstances of the adultery should be stated.

If the charge of adultery is not sufficiently explicit, the objection may be made when a feigned issue is applied for.

Where the wife is the defendant in a suit for a divorce, if she denies on oath the charge of adultery, or shows a valid defence by reason of condonation or otherwise, she is entitled to a reasonable allowance for her support pending the litigation, and to enable her to defend the suit.

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THE bill in this cause was filed for the purpose of obtaining a divorce on the ground of adultery. The wife put in a general answer denying the adultery charged in the complainant's bill, and a feigned issue was thereupon directed. A petition was afterwards presented by the defendant, stating on oath that she was innocent of the adultery charged against her; but that her husband had by threats of violence and under peculiar circumstances

obtained from her written confessions which he intended to make use of against her on the trial; that since her answer had been put in, she had been informed that adultery on his part would be a bar to the suit; and that he had lived and cohabited with her since the time the written confessions were given. She also alleged that she had been informed and believed that her husband had committed adultery with a particular person named in the petition, and with others whose names were not mentioned. And she asked for leave to amend her answer by setting up these matters of defence therein, and that the feigned issue might be made to correspond therewith. She also stated that her husband was a man of large property, and that her father was poor and confined on the limits, and was unable to support her or to furnish the means of making a *proper defence. She therefore prayed an allowance for herself and child pending the litigation, and a sufficient sum to meet the expenses of the suit.

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A. Van Vechten, for the complainant.

Julius Rhoades, for the defendant.

THE CHANCELLOR. The application on the part of the defendant to put in a new answer must be granted as a matter of right. The former answer and the whole proceedings founded thereon have been irregular. It appears from the affidavit of the complainant, as well as from the petition of the defendant, that she was married in January, 1825, when she was only in her sixteenth year. She was therefore an infant at the time the answer was put in and when the feigned issue was awarded. She appeared and put in the answer by a solicitor instead of a guardian when she was legally incompetent to understand and defend her own right. Although a wife may sue or be sued as though she were a feme sole where the bill is filed to obtain a divorce on the ground of adultery, yet if she is

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an infant she must prosecute or defend by her next friend or guardian as in other cases. Although she denies oath that she has been guilty of the adultery charged, she also has a right to set up other matters in bar of the divorce, if the husband should succeed in establishing the fact against her. She swears she was not advised as to her legal rights when the answer was put in; and she was legally incompetent to make the defence if she did understand them. If she is now of age she has a right to put in a new answer, insisting upon the adultery of her husband; and any other matter which, if true, will be a legal bar to his suit. If he has voluntarily cohabited with her after a full knowledge that she had been unfaithful to him, it would be such a condonation or forgiveness of the injury as to bar the suit for a divorce. These principles introduced into the revised statutes, have not changed the law on the subject of divorce. They are only declaratory of what the law was previous to their enactment. *Foster v. Foster*, (1 Consist. Rep. 144,) recrimination set up in bar of a suit for a divorce, brought by the husband against the wife, in the consistory court of London and the adultery of the husband was held a valid bar although the adultery of the wife was fully established. In that case Sir William Scott shows such to have been the settled law of England long before the American Revolution. It was therefore the law of this state at the time this suit was instituted, and is now incorporated into our statutes. It is true the French law is different on this subject; but it may also be observed that divorces are there obtained for many other causes than that of adultery. Here they are only granted for the criminal acts of one of the parties, and in favor of the one who is innocent. If both parties are guilty, neither has any claim to relief, and they are in that case suitable and proper companions for each other.

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It is also objected to the new answer proposed to be put in by the defendant that she does not specify, except

in one instance, the persons with whom the complainant has had criminal intercourse; so that he may on the trial be surprised with evidence which he is unable to meet or explain. And that it appears from her own showing that there has been a condonation of the adultery attempted to be set up by way of recrimination, if it ever was committed. In *Beebe v. Beebe*, (1 Haggard, 789,) Lord Stowell says condonation is forgiveness legally releasing the injury, and may be either expressed or implied. On the part of the husband, it may be implied from his cohabiting with a delinquent wife after knowledge of her guilt; for it is to be presumed he would not take her to his bed again unless he had forgiven her. But condonation, by implication from the fact of cohabitation, ought not to be held a strict bar against the wife. She is in a measure under the control of her husband. And this distinction will be found running through all the English case on this subject. (*D'Anguillar v. D'Anguillar*, 1 Haggard, 786. *Kirkwall v. Kirkwall*, 2 Consistory Rep. 279. *Best v. Best*, 1 Adam's Rep. 411.) It does not follow because a donation or forgiveness by the complainant will bar a suit for a divorce, that it will have the same effect as to a defence, by way of recrimination, set up by the *defendant. That must depend upon the particular circumstances of the case. (1 Haggard, 797.)

As to the manner in which the adultery should be charged in the bill or answer, the case of *Germond v. Germond*, (6 John. Ch. R. 347,) has been cited; but it throws but little light on the subject. The extent of the decision in that case was, that the person with whom the adultery was committed need not be named if his name was not known to the complainant. But the subsequent history of that cause, which was finally disposed of in 1828, (1 Paige's Rep. 83,) may serve to illustrate the necessity and propriety of detailing the particular acts of adultery in the bill or answer with sufficient certainty to put the adverse party on his guard, so that he may be prepared on

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the trial of the issue to rebut or explain the circumstances given in evidence against him. On the first trial, the defendant was surprised with a charge of adultery against her, said to have been committed with a man then dead, and a verdict was found for the complainant perfectly satisfactory to the judge who tried the cause. The chancellor also thought there was no good reason for disturbing the verdict for any other cause than that the testimony was not warranted by the issue. It afterwards turned out that the defendant was an innocent woman. The principal witness, on whose testimony the first verdict had been found against her, had written a letter to the husband offering to furnish him with testimony sufficient to obtain a divorce if he would give him \$1000; and this witness was originally named in the bill as the person with whom the adultery was committed. A second trial took place, in which the innocence of the wife was established by the verdict; but some irregularity having been discovered in obtaining the jury, a third trial was awarded. The cause was then tried by a struck jury. The same witness was called, and swore to adultery committed with himself as well as with the deceased person. But the time fixed by him when his own criminal connection took place turned out to be when he was not old enough to commit adultery. It also appeared that two respectable persons had been offered from \$500 to \$1000 if they would seduce the defendant so that a divorce might be obtained. And the defendant was again acquitted to the entire satisfaction of every disinterested person who heard the trial.

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The only safe and prudent course is to require the charge, whether of crimination or recrimination, to be stated in the pleadings and in the issues in such a manner that the adverse party may be prepared to meet it on the trial. If the persons with whom the adultery was committed are known, they must be named in the defendant's answer, and the adultery must be charged with reason-

able certainty as to time and place. If they are unknown, that fact should be stated in the answer and in the issue, and the time, place and circumstances under which the adultery was committed should be set forth. Neither party has a right to make such a charge against the other on mere suspicion, relying upon being able to fish up testimony before the trial to support the allegation. When information sufficient to justify the charge is given, the party will be possessed of the requisite facts to put the charge in a distinct and tangible form on the record. The practice in the ecclesiastical courts of England is to set out all the principal facts of the case in the libel, or in the recriminatory allegation. But perhaps it would not be reasonable to require so much particularity here. If the charges in the bill or answer are not sufficiently explicit, the parties may make that objection when an issue is applied for; and the court will then see that it is so framed that neither party shall take any undue advantage of the other at the trial.

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It does not appear from the petition or affidavits whether the defendant is now of age, or still a minor. If she is under age, the new answer must be put in by a guardian ad litem, appointed for that purpose. When the cause is at issue either party may apply to the court for a feigned issue agreeably to the 167th rule.

The defendant is also entitled to a reasonable allowance for the purpose of enabling her to defend this suit; and to alimony for the support of herself and child pending the litigation. In *Wilson v. Wilson*, (2 Consist. Rep. 204,) Sir William Scott says, "In suits instituted either by the husband or the wife, for I consider that fact to be indifferent, the wife is a privileged suitor, as to costs and alimony; and on the same principle that the whole property is supposed by law to be in the husband. If the wife, therefore, is under the necessity of living apart, it is also necessary that she should be subsisted during the pendency of the suit; and that she should be enabled to procure jus-

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 Wood in *D'Anguillar v. D'Anguillar*, (1 Haggard's Eccl. Rep.
 v. 788,) the same learned judge says, "In general, the hus-
 band is bound to defray the wife's costs; otherwise the
 wife would be disarmed, and denied justice. The hus-
 band has by the law of this country, all the property; and
 therefore, the wife must have the means of self-defence,
 and of subsistence from him; but when she has a separate
 fortune the court always considers whether such separate
 means are sufficient for self-defence and self-subsistence."
 If the court is satisfied the wife has no reasonable ground
 of complaint, or is altogether in the wrong, it might, in
 the exercise of a sound discretion, refuse the means to en-
 able her to carry on an unjust litigation at the expense of
 her husband. But it would be manifestly unjust to con-
 demn the wife unheard, or upon the ex parte affidavits of
 witnesses, when she has had no opportunity to cross ex-
 amine them or to disprove their allegations.

In this case the husband swears to her guilt, and relies
 upon her written confessions and letters, and the testi-
 mony of his female servant, to establish it. Although he
 denies the charge of adultery on his part, with the particu-
 lar person named, he does not deny it generally as to those
 she has not named in her petition. Nor does he deny
 that he lived and cohabited with her after the adultery
 charged against her was committed, and after he had in
 his possession the written confessions of her guilt. It is
 impossible, therefore, for me to say whether he will be
 entitled to a divorce, even if he establishes her guilt to
 the fullest extent. If she proves the fact of subsequent
 cohabitation, it may probably amount to such a condona-
 tion of her adultery as to bar his claim for a divorce.
 But her account of the case is materially different; and
 as I have before stated, I cannot now undertake to *decide
 between the conflicting oaths of these parties. She says
 he seduced her at the early age of fifteen, under a promise
 of marriage, and that being afterwards prosecuted by her

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father, he consented to marry her; but she says she has been informed that he stated before the marriage he would contrive to get rid of her. She swears that she is wholly innocent of the charge of adultery; that the confessions and letter to her father were drawn by her husband, who compelled her to sign them by threatening violence and to take from her her children, while she was living and cohabiting with him. She further stated that she had been deprived of the advice and counsel of her father in consequence of the violent quarrel which existed between him and her husband. She is a very base and perjured woman, or she has been shamefully used and persecuted. In either case she is entitled to a fair and impartial trial before any decision can be had on the question; and the husband, having sufficient property for that purpose, must furnish the means for the subsistence of herself and child pending the litigation, and of making a proper defence to the suit. Considering the nature of this controversy, it would be unreasonable to require her to remain under the control of her husband in the mean time, or in any situation he may choose to select for her at a distance from her friends.

He must therefore pay to her solicitor or guardian \$150 to enable her to defend the suit, and to bear the expenses of the trial of the issue if one shall be awarded. And it must be referred to a master residing in the county of Tompkins, to examine and report what reasonable sum should be allowed to her monthly for the support of herself and of her oldest child; commencing from the time of the filing of the complainant's bill.[1]

[1] Whether in this state, where a divorce *a mensa et thoro* only is granted for cruel and inhuman treatment, a divorce *a vinculo matrimonii* will be granted, when an adultery has been committed by the husband, a condonation of the offence, and subsequent cruel and inhuman conduct on the part of the husband? In other words, does the rule of the English law, that a condonation of the offence of adultery implies a condition not only that the same offence shall not be repeated, but that the wife shall be treated with conjugal kindness, and that on breach of the latter part of the condition, the right to sue for a divorce dissolving the marriage con-

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tract is revived, prevail here! *Johnson v. Johnson*, 14 Wend. 637. It is prima facie evidence of adultery that a husband, long after marriage, is infected with the venereal disease. Ib. Where, in an action of ejectment for dower, in answer to proof on the part of the defendant that the plaintiff, previously to the marriage by virtue of which she claimed dower, was a married woman, and that her first husband was still alive, the plaintiff produced a record of the superior court of Connecticut, containing a sentence of divorce, on her petition, from her first husband, and such record did not state that the husband was served with process, or had notice of the proceedings, or appeared; but, on the contrary, alleged that the adjudication was made on hearing the plea and evidence produced by the plaintiff; and the defendant in the ejectment suit further proved that the first husband of the plaintiff, at the time of the presentation and of the granting of the divorce, was an inhabitant of the state of New-York; it was held, that the divorce was void and inoperative here, and that the plaintiff was not entitled to recover dower in any lands of which her second husband died seized, although such divorce was granted thirty-eight years previously to the trial of the action for dower, and twenty years had elapsed since the second marriage. *Bradshaw v. Heath*, 13 Wen. 407. A divorce of persons domiciled in this state decreed in another state, is invalid here. *Pauling v. Willson*, 13 J. R. 192. But if the parties, although domiciled here, were married in the state in which the divorce was decreed, and appeared and litigated the question of divorce there, whether it may not, under the circumstances, be valid? Ib. But, admitting such a decree to be valid, if it made no provisions with regard to the children of the marriage, and there was no agreement between the parties as to their maintenance, the mother cannot (the guardianship of the children having been decreed to her) support an action against the father for their maintenance; both parents being equally bound to maintain their children, she can at most claim from him contribution only. Ib. If the wife of a citizen of this state leave her husband for the express purpose of going into another state, and there obtaining a divorce, which she does, and a divorce is decreed on grounds which would not authorize it by our law, and likewise alimony adjudged to her, such conduct being in evasion of the law, she cannot support an action upon the decree. *Jackson v. Jackson*, 1 J. R. 424. A divorce obtained in Vermont by a husband from his wife, who resided in another state, and had no notice of the pendency of the proceedings, is void, and will not legalize a subsequent marriage by the husband in this state. *Borden v. Fitch*, 15 J. R. 121.

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*THE CAYUGA BRIDGE COMPANY v. MAGEE AND OTHERS. Cayuga Br'ge
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Magee.

The provisions contained in the 2d section of the act of March, 1799, incorporating the Cayuga Bridge Company, prohibiting all other persons from erecting a bridge or establishing a ferry within three miles of the place where the company should erect their bridge, do not extend to the bridge erected by the company across the outlet of Cayuga Lake in 1809; the company having previously, by erecting a bridge across the Cayuga Lake between the villages of East and West Cayuga, located the site of the bridge authorized to be erected by the aforesaid act.

Exclusive privileges contained in a private act of incorporation, which are in derogation of the common law rights of the citizens at large, ought not to be extended by implication.

They must be construed strictly against the company, according to the principles of the common law.

Where the injunction may produce serious injury to the defendant, if the officer allowing the same neglects to take security from the complainant to pay such damages as may be sustained, the defendant may apply to the court for relief.

THE bill in this cause was filed by the complainants in April 6th. 1827, to restrain the defendants and their associates from erecting a free bridge across the Seneca river or Cayuga outlet, between the north bridge of the complainants and that of the Montezuma Bridge Company, under the act of the 16th of April, 1825. An injunction was granted by the late chancellor, which had suspended the proceedings of the defendants. The cause was now brought to a hearing on bill and answer. The facts in the case are sufficiently stated in the opinion of the court.

D. B. Ogden and J. A. Johnson, for the complainants.

N. W. Howell and J. C. Spencer, for the defendants.

THE CHANCELLOR. The facts in this case are few and simple; and the cause turns upon the legal construction of the act incorporating the Cayuga Bridge Company, and the several acts amending the same. The company were incorporated in March, 1797, for the term of 25 years, for the purpose of building a bridge over the Cayuga lake or the outlet *thereof, with a capital of \$25,000. (Sess. 20,

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1880. ch. 59.) But the corporation was to be dissolved if the
 Cayuga Br'ge bridge was not completed within three years from the
 Company time of their incorporation. By the act of March, 1799,
 v. (sess. 22, ch. 21,) the time for erecting and completing the
 Magee. bridge was extended to the 1st of May, 1801, and the
 duration of the charter was extended to seventy-five years.
 The second section of that act prohibited any other persons
 from erecting a bridge or establishing a ferry within three
 miles of the place where the said bridge should be erected
 by the company, or from crossing the lake within the
 same limits without paying toll to the corporation. The
 eighth section declared that the company should be dis-
 solved if the bridge should remain impassable for 30 days
 after it was completed; or, if carried away by the ice, if
 it should not be re-built within eighteen months thereafter.
 The company erected the bridge across the lake between
 the villages of East and West Cayuga previous to May,
 1801, and kept the same in repair until the spring of 1809,
 when it was carried away by the ice. After the bridge
 was destroyed by the ice, it was not re-built until 1813;
 at which time a new bridge was erected on the same site,
 under the provisions of the act of the preceding year.
 But shortly after the destruction of the first bridge, the
 company erected a new bridge over the outlet of the lake
 about two miles north of the site of the first bridge. In
 February, 1812, the inhabitants of the counties adjacent
 to the lake supposing the corporation had forfeited its
 charter by neglecting to re-build the bridge at the former
 site thereof applied to the legislature for aid in erecting a
 bridge at that place. This application and the remon-
 strance of the company resulted in a concurrent resolution
 of the senate and assembly, directing the attorney general
 to take legal measures to try the validity of the charter
 rights of the company. Before any effectual proceedings
 were had under this resolution, a compromise was made
 between the agent of the company and those petitioners
 who were more immediately interested in the erection of

a bridge across the lake at its former site, which resulted in the act of June, 1812, (sess. 35, ch. 137.) By that act, the company were authorized to add \$50,000 to their capital stock, for *the purpose of building a substantial bridge across the Cayuga lake on the site of the first bridge. The second section provides that when the said bridge shall be completed, the company shall have, possess and enjoy all the rights, privileges and immunities which were granted to them by the original act of incorporation and the several acts amending the same; subject to certain restrictions and limitations contained in that section, which do not appear material to the decision of this cause. By the third section of the act, they are authorized to take toll for crossing the bridge over the outlet of the lake, and are bound to keep that bridge as well as the bridge across the lake in repair and to re-build them when carried away or destroyed, under the penalty of a forfeiture of their charter.

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The site of the free bridge of the defendants and their associates is more than three miles north of the company's bridge across the Cayuga lake, but it is only a few rods over one mile from their bridge across the outlet. The complainants insist that under the several acts in relation to their company they have the exclusive right to the distance of three miles both ways from each of their bridges; and that no bridge or ferry can be erected or established, and no person can cross the lake or outlet within those distances without paying toll to them for the privilege. On the part of the defendants, it is contended that the exclusive right of the corporation is confined in extent to three miles each way from the place where their first bridge was erected, and where their present bridge across the lake now stands.

If the construction contended for by the complainants is correct, it is evident no free bridge can be erected. The Montezuma bridge is within six miles of the company's bridge over the outlet; and by the ninth section

1830. of the act of the 31st of March, 1815, (sess. 38, ch. 120,) no bridge can be built within three miles of the place where the Montezuma bridge is erected. The act of 1825 authorized the defendants and their associates to erect a free bridge "at a certain point in the vacancy between the bounds or rights included in the respective charters of the Cayuga Bridge Company and the Montezuma Bridge Company, near to and north of the north boundary of the first mentioned charter." This is urged by *the defendants as a legislative construction of the charter of the complainants. I think the legislature did not intend to pass upon the question now in controversy, but to leave it to be settled by the parties, or by the courts. The precise distance between the Montezuma bridge and the bridge of the complainants over the outlet, does not now distinctly appear by the pleadings; and probably it was not certainly known to the legislature. And by the proviso, the defendants are prohibited from erecting their bridge at any place where the same may violate, or be contrary to the vested rights of either of those companies.

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The exclusive privileges contained in the second section of the act of March, 1799, are in derogation of common right, and therefore ought not to be extended by implication. A majority of the supreme court have decided that no person can cross the lake on the ice, within the prescribed limits, without being liable to pay toll to the corporation. (*The Cayuga Bridge Company v. Stout*, 7 Cowen's R. 33.) It therefore is the more important that such injudicious grants of exclusive privileges should not be farther extended by construction. The act of 1797 is declared to be a public act, and is to be construed benignly and favorably for every beneficial purpose therein intended. No exclusive privilege was granted by that act; and it is proper to remark, that no such provision is contained in the acts of 1799 and 1812. So far, therefore, as the two last acts are in derogation of common right, they must be construed strictly against the company,

according to the principles of the common law. (2 Mass. R. 146. 4 id. 140. 2 Mod. R. 57.)

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It may be proper in the first place to ascertain what were the rights of the corporation under the act of 1799 in relation to this exclusive privilege, and then see how they were altered or affected by the subsequent act. The act of 1797 authorized the company to erect a bridge either across the Cayuga lake, or the outlet thereof. In the act of 1799, the outlet is not mentioned, either in the clause extending the time to complete the bridge, or in that which prohibits persons from crossing without paying toll. Whether the language of this act was changed because the company had determined to build their bridge across the lake instead of the outlet cannot, probably, be ascertained without referring to the petition on which that act was founded, and other facts not before me on these pleadings. Without reference to this change in phraseology, it is evident the three miles must be reckoned each way from the place where the bridge was first erected across the lake. The language of the restriction is, that it should not be lawful to erect any bridge or establish a ferry within three miles of the place where the aforesaid bridge shall be erected and built by the company. The bridge there spoken of was the bridge across the Cayuga lake, and which was to be completed previous to the first of May, 1801; and the place from which the three miles was to be reckoned was the place where that bridge actually was erected within the time limited for that purpose. The moment the bridge was completed, the legislature had a right to grant a similar privilege to any other person or company, beyond the prescribed limit of three miles each way from that place. But upon the construction contended for by the complainants, if their bridge was destroyed by the ice at any time within the seventy-five years, they were at liberty to build a new bridge at any place between Ithaca and Jack's rifts, and to prevent all persons crossing within three miles thereof

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without paying toll to them. It is not necessary to decide whether the company was obliged to re-build on the same site, within the eighteen months after the bridge was destroyed. The act of 1812 has rendered that point perfectly immaterial. I am inclined to think the citizens of the state who were prohibited from crossing the lake within three miles of that place, or from building a bridge, or establishing a ferry within those limits, had a right to insist upon the re-building of the bridge at the same place. But if the company were authorized to rebuild it at any other place within the six miles, the restricted limits were not thereby extended beyond the three miles north of the place where the first bridge was erected.

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There is nothing in the act of 1812 which either expressly or by implication extends the restricted limits beyond what they were under the act of 1799. The original *charter was confirmed by the legislature, on condition that the company should erect a new bridge on the site of the first; and should keep not only that bridge, but also the one which they had erected over the outlet, in repair during the existence of their charter. It is evident from the preamble, and from the various provisions of that act, that the legislature only intended to restore the complainants to the privileges which they had probably lost by their neglect to re-build a bridge at the East and West Cayuga villages, and to give them the right to take toll at the bridge erected over the outlet. An extension of the chartered limits to the distance of three miles north of the bridge over the outlet was not necessary for the purposes of the corporation, as they already went a mile beyond the bridge. While the legislature were imposing so many restrictions upon the company as conditions upon which their charter might be confirmed, and when it was deemed necessary to insert an express provision in the third section of the act, permitting them to take toll at the bridge over the outlet notwithstanding the implied provision in the preceding

section, I cannot believe they intended to extend the chartered limits two miles farther in that direction. If such had been the intention of the legislature, an express provision to that effect would have been found in the act of 1812. In *Doe v. Brandling*, (1 Mann. & Ryl. R. 611,) Bailey, J. says: "I consider it an established and highly useful rule in the construction of all acts of parliament of a local and personal nature, to require that the persons soliciting an act of parliament should state in it plainly, distinctly and unequivocally what they mean, in order that the public on the one hand, and the legislature on the other, may not be taken by surprise, and may not be left in doubt as to the object and effect of the enactment." By the preamble of the act of 1812, it appears that the provisions thereof were agreed to by the agent of the complainants. They are therefore entitled to no rights which are not expressly granted, or clearly implied in the act.

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The result of this opinion is, that the defendants and their associates are authorized to erect the free bridge at the place *where they had commenced building the same. The injunction must be dissolved, and the complainants' bill is dismissed with costs.

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I regret that in this case it is not in the power of the court to remunerate the defendants for the loss they have sustained. The injunction has compelled them for a time to suspend their operations, to the great damage of their work which was partially completed; and much loss must have been sustained by the waste and deterioration of materials. My predecessor understood the rights of the parties differently; it was therefore his duty to issue, and continue the injunction. The new rules of the court have provided for cases of this kind hereafter, by requiring a bond from the complainant to pay the damages sustained by the defendant, in consequence of an injunction, if the justice of the case turns out to be in favor of the latter. (Rule 31.) If the officer allowing the injunction

1830. neglects to take such bond, in a proper case, the parties
 Covenhoven liable to be injured by the injunction must make a special
 v. application to the court for relief.
 Shuler.

COVENHOVEN AND OTHERS v. SHULER AND OTHERS.

Where L. S. by his will gave to his wife the one third of the residue of his personal estate, after his debts and legacies were paid; and also the use of all the residue of the personal estate and the occupation and enjoyment of the farm on which the testator lived, so long as she remained his widow; and in case of her marriage, he gave to her during life the use and occupation of one third of his real estate; and in that event, directed that the income of the remaining two thirds should be applied to the education and maintenance of his children; and after the youngest child became of age, he directed his executors to divide all his real and personal estate equally among his children, to have and to hold to them and their heirs forever, and declared that he intended the bequest and devise to his wife should be in lieu of dower; the wife elected to take under the provisions in the will; it was held that the widow was entitled to the use of the whole estate during her widowhood; that one third of the personal estate was hers absolutely, and in case she married that she would have the use of one third of the real estate for life in lieu of dower.

It was also held that the children of the testator could compel the widow to account for all the personal estate, and that their share of the same should be invested, and the income paid to the widow during her life or widowhood, and that the principal, after her death or marriage, should be divided among them according to the provisions in the will.

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If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator. But this rule is only applied to those cases where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained.

The leading principle in the construction of wills is, that the intention of the testator, if not inconsistent with the rules of law, must govern. And this intention is to be ascertained from the whole will taken together.

And where the intention of the testator is incorrectly expressed, the court will carry it into effect by supplying the proper words.

The words of the will may be transposed in order to make a limitation sensible or to effectuate the general intent of the testator.

Where specific chattels not necessarily consumed in the use are bequeathed for life with a limitation over, the practice is to require from the first taker an inventory of the goods, specifying that they belong to him for the particular period only, and afterwards to the person in remainder. And security is not required from the first taker unless there is danger that the articles will be wasted or otherwise lost by the remainderman. If there is a general bequest of a residue for life with remainder over, although it includes articles which are consumed in the using, the whole must be sold and converted into money, and the proceeds invested; and the interest only is to be paid to the legatee for life. If persons are made parties defendants unnecessarily, the bill will be dismissed as to them with costs.

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LAWRENCE SHULER died in 1808, possessed of a farm containing about 300 acres, in fee, together with a considerable personal estate. He left by his wife Lena Shuler eleven children him surviving, to wit: Peter Shuler, Levi Shuler, Mary the wife of Jacob Serviss, Jeremiah Shuler, William Shuler, Caty the wife of Peter Covenhoven, Betsey Shuler, Sally Shuler, Abraham Shuler, Van Vleek Shuler, and Lawrence Shuler. The youngest was then less than one year old, and became of age in December, 1828. The will of Lawrence Shuler the elder, executed in due form of law to pass real estate, was in the following words: "I will and order that all my just debts and funeral expenses be paid out of my personal estate by my executors, as soon after my decease as they find themselves enabled conveniently to do it. Secondly, I give and bequeath unto my daughter Ann, wife of David Cady, the sum of \$250, to be paid to her or her legal representatives, within one year after my decease by my executors, out of such of my personals as they may think proper to dispose of for that purpose. Thirdly, I give, devise, and bequeath unto my beloved wife Lena, the one third of the residue of my personal estate, after my debts, funeral expenses, and the above legacy to my daughter Ann shall be paid off and discharged; together with the use of all the residue of the personal estate and the occupation and enjoyment of that part of my real estate

April 6th.

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1830. whereupon I now reside, containing 300 acres more or
 Covenhoven less, just as the same is now possessed by me, so long as
 v. she remains my widow ; and after her marriage, I do give
 Shuler. the use, occupation, and enjoyment of one third of said
 real estate to her during her natural life ; at which time
 the income of the remaining two thirds is to be applied
 for the education and maintenance of such children as she
 has together by me ; and after the youngest of the said
 children shall become of age, I request and order my
 executors to make an equal division of all my real and
 personal estate to be made, equally to be divided among
 said children which I had by my wife Lena, to have and
 to hold them, their heirs and assigns forever. And I do
 hereby declare that the devise or bequest above made to
 my said wife is by me intended to be in lieu of, and an
 extinguishment of her right and title of dower to any part
 of my real estate. And lastly, I do hereby nominate and
 appoint my son John Shuler and my brother-in-law
 George Serviss, executors of this my last will and testa-
 ment," &c. George Serviss died before the testator, and
 the other executors duly proved the will. Jeremiah
 Shuler died about three years after his father, unmarried
 and intestate. Peter Shuler, Mary the wife of J. Serviss,
 and William Shuler, after the death of Jeremiah and be-
 fore the commencement of this suit, sold and conveyed
 all their interest in the estate to their mother the widow,
 who still remains unmarried. She elected to take the
 provisions made for her by the will in lieu of her dower ;
 and the executor, after paying the funeral expenses, &c.,
 and the legacy to Mrs. Cady, permitted her to take pos-
 session of the real and personal estate. In April, 1822,
 the widow leased the farm to Benjamin and Rufus Her-
 rick for the term of five years, at the yearly rent of \$200.

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*In 1824, Peter Covenhoven and wife, Van Vleek
 Shuler and Levi Shuler, and Lawrence Shuler then an in-
 fant of the age of sixteen years, by Covenhoven as his
 next friend, filed their bill in this cause against Lena

Shuler the widow, and B. Herrick her tenant, and John Shuler the executor; and also against William, Betsey, Sally, and Abraham Shuler, children of the decedent, who had refused to join as complainants in the suit. The bill alleged that the executor had collected and converted to his own use, or had wilfully and negligently permitted the widow to collect and convert to her use large sums of money due to the estate, and had permitted her to lay out the same in the purchase of the shares of two of the devisees and legatees, and that she had taken a conveyance of those shares in her own name; that the executor had taken no security from the widow to account for the personal estate when the youngest child came of age; that the personal responsibility of the executor had become a slender security for his liabilities as such executor; that he had large demands against him, and had threatened to put his property out of his hands for the purpose of avoiding the claims of the complainants against him. The same allegation in substance was made as to the widow. The bill also charged that the lease to Herrick was made with intent to defraud the complainants; that the complainant Lawrence Shuler had no means of maintenance and education except those provided by the will; that a suitable allowance ought to be made to him out of the estate during his minority; that the executor and the widow had been requested to account to the complainant for the personal estate, and to make a suitable allowance for the maintenance of the infant Lawrence Shuler; that they refused to account for the personal estate, and also refused to support the infant unless he should remain in the family of his mother. The bill prayed an account of the personal estate from that executor and the widow, and that the same might be secured during the minority of the youngest child, and then distributed according to the will. The bill also prayed that a receiver of the rents and profits of the real estate might be appointed, and that an allowance might be made for the maintenance and

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1830. *education of Lawrence Shuler out of the estate, and for
Covenhoven general relief.

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Shuler.

B. Herrick put in an answer denying all fraud in taking the lease, and all knowledge or information as to any claim against the farm by the complainants; and he insisted that he took the lease in good faith, believing that Lena Shuler had a perfect right to lease the farm for the five years. William Shuler stated in his answer that he had sold and conveyed to the defendant Lena Shuler all his interest in the estate, long before the filing of the bill; and that he believed that fact was well known to the complainants or to some of them; that he had never since claimed any interest in the estate, and he disclaims all title and interest therein. Lena Shuler by the answer admitted the facts stated in the bill, except as to her own insolvency or any fraud on her part. And she annexed to her answer an inventory of all the personal estate and effects of which her husband died possessed, with the value thereof. She also admitted that the whole came into her possession except the amount of the \$250 legacy paid to Mrs. Cady; that she had sold many articles of the personal property, and had applied the proceeds thereof to the support of her children and in making advances to them and for her own uses; and that she was ready and willing to account for such articles at their full value. And she stated that she was also ready and willing to account for all the property belonging to the estate which had been received by her, and to give such security as the court should direct for the payment to the complainants respectively of such sums as they will be entitled to when the same shall become payable according to the will of the testator. But she insisted upon her right to retain the articles now on hand, and to restore them in specie when the children should be entitled thereto. She also claimed in her answer the right to retain the possession and use of all the real and personal estate of her husband during her widowhood under the provisions of

the will; and that in accounting with the complainants respectively, she was entitled to charge them with all moneys which she had advanced for their support, maintenance, and education. She further stated that she had *refused to give security to the complainants because she believed they had no right to require the same; that she had also refused to advance money to Lawrence Shuler for his maintenance and education, and she insisted that she was under no legal obligation to do so, but that she had always been willing to support and maintain him, if he would submit himself to her direction and control; and that she had always been and still was desirous of educating and supporting him in the same manner as she had done the other children of the testator. The other defendants put in answers, substantially admitting the facts as was done in the answer of their mother, but without saying any thing as to the construction of the will. They admitted that they refused to become parties complainants to the suit, and insisted that they were unnecessarily made defendants. The cause was heard upon the bill and answers as against all the defendants except the executor, who did not answer.

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D. Cady, for complainants. The bill was filed in this suit against John Shuler, executor of the will of Lawrence Shuler, Lena Shuler and such of the children of the testator as refused to be complainants. The children now disclaim all interest in the controversy, and claim to have the bill dismissed with costs. The bill cannot be dismissed for this cause, because it would have been bad upon demurrer if the children had not been made defendants. It is an established rule in equity, that the rights of all the parties in interest must be settled in one suit. (Mitf. Pl. 39, 144, 220.) The widow is only entitled under the will to the use of all the real and personal estate during widowhood, or until the youngest child arrives at the age of 21. The last clause of a will revokes a former

1530. one. (*Ulrich v. Litchfield*, 2 Atkins, 372. *Paramour v*
 Covenhoven *Gardley*, 2 Plowd. R. 540.) Where there are inconsistent
 v. devises of real property, a joint tenancy or tenancy in
 Shuler. common is created; otherwise as to personal property
 (*128) (*Westfailing v. Westfailing*, 3 Atk. R. 461. 4 Cruise's
 Dig. 165, tit. Devise, ch. 9, § 22.) Herrick was made a
 defendant in order that he might be bound by an order
 for the appointment of a receiver of the rents and profits
 of the real estate which will be made, if it appears that
 the personal estate has been wasted by the defendants
 Lena Shuler and John Shuler. Lena Shuler having ex-
 pended the personal in the purchase of the real estate, the
 complainants are entitled to a recovery against the real
 estate. The estate being given to the widow as a residue,
 the complainants are entitled to an account of the same,
 and can insist upon its being sold, the proceeds invested,
 and only the income paid to the widow. (Preston on
 Legacies, 95, 96.)

M. T. Reynolds, for the defendants. The widow is not
 bound to account to the complainants. They should have
 called the executor to an account. The complainants can
 only require security for the payment of their share of the
 estate when the same becomes due. The widow is entitled
 under the will to the use of the real and personal estate
 during her widowhood. This was the evident intention
 of the testator; and this construction will give effect to
 the whole will. The rules as to a joint tenancy can only
 be applied where there is a manifest repugnancy. A re-
 ceiver will not be appointed, as the widow is abundantly
 able to respond. The children were improperly made
 parties, and the bill should be dismissed as against them
 with costs. The only object of this suit can be to obtain
 security from the widow, not an account. And in such
 a case it was not necessary the children should be made
 parties. As soon as they became of age, they declared
 themselves opposed to this suit. Both William Shuler

and Herrick were unnecessary parties. They are likewise entitled to have the bill dismissed as against them with costs.

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THE CHANCELLOR. As the complainants have not given the defendants an opportunity to substantiate their answers by proof, every matter of fact stated or insisted upon therein is to be taken as true. The defendant W. L. Shuler disclaims all interest in the subject matter of this suit. He says he sold and conveyed all his interest in the estate to his mother long before the filing of the bill; and that he believes that fact was known to the complainants. They had therefore *no excuse for making him a party; and the bill as against him must be dismissed with costs. Herrick was also unnecessarily and improperly made a party to the suit. He was a bona fide lessee, for a term of years which would expire before the youngest child became of age. Even upon the complainants' construction of the will, the widow was entitled to the rents and profits of the farm until that time. And if they were entitled to a receiver of the rents and profits, to secure and apply them in aid of any deficiency of the personal estate, the tenant of the estate need not be a party to the suit. If he refused to attorn to the receiver, the latter might be directed to proceed against him in the name of the lessor to recover the rent as it became due. But there was no pretence for appointing a receiver of the income of the farm in this case during the minority of any of the children. The bill, as against Herrick, must therefore be dismissed with costs.

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The defendants Betsey, Sally and Abraham Shuler, were necessary parties, if the complainants are entitled to an account or to any other relief in this case. They had a common interest with the complainants in the estate, and in the establishment and construction of the will. If the bill can be sustained even for the purpose of obtaining security, the complainants would be permitted to re-

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tain it for the purpose of having the trusts of the will carried into effect under the direction of the court. This could not be done if all the parties interested in the estate were not before the court. Whether these defendants must bear their own costs, or whether they must be paid by the complainants, or out of the estate of the testator, are different questions.

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The next question which arises in this case is, what interest in the property did the widow of the testator take under the will? The rule contended for by the complainants' counsel is undoubtedly correct, as stated by the master of the rolls in *Sims v. Doughty*, (5 Ves. 247.) If two parts of a will are totally irreconcilable, the subsequent part is to be taken as evidence of a subsequent intention. But this rule is only adopted from necessity, to prevent the avoiding of both *provisions for uncertainty. It is only applied in those cases where the intention of the testator cannot be discovered, and where the two provisions are so totally inconsistent that it is impossible for them to coincide with each other, or with the general intention of the testator. The great and leading principle in the construction of wills is, that the intention of the testator, if not inconsistent with the rules of law, shall govern; and that intent must be ascertained from the whole will taken together; and no part thereof to which meaning and operation can be given, consistent with the general intention of the testator, shall be rejected.[1] Where the words of

[1] Mere intention will not countervail settled rules of interpretation, and the quality of an estate passed may not be conjectured, but must be determined affirmatively by the words of the will, taken together and liberally construed to effect the intent manifested by the will. Before the R. B. of New-York, a devise without words of limitation passed a life estate only, unless the will indicated plainly the intention to give a larger estate. *Lippen v. Eldred*, 2 Barb. 130. By will, made prior to the revised statutes, if lands are devised generally, without words of limitation or inheritance, only a life estate passes. *Harvey v. Olmsted*, 1 Com. 488. And a direction that the "real and personal estate be divided and distributed," does not enlarge the devise into a fee. *Ib.* Where the devise does not contain

one part of a will are capable of a two-fold construction, that should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions

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words of limitation, a charge to carry a fee by implication, must be on the person of the devisee in respect to the lands devised, and in such case the devise assumes the character of purchase. *Ib.* Under the former statute of wills, a rent, reserved upon a grant in fee, did not pass by a devise of the land out of which the rent issued, as land. *Harrington v. Budd*, 5 Denio, 521. Otherwise of rents reserved on a lease for a term of years, such rents and the reversion would pass by devise of the land. *Ib.* A general devise to the heirs of a person who is then living, but is not referred to as living, is void, for *nemo est hæres viventis*; but a devise to the heirs of one who is stated in the will to be then living, is a valid disposition in favor of those who would be his heirs if he should then die, they being at the time his heirs apparent. *Ib.* A testator, by will which took effect after the revised statutes came in force, devised to one of his sons certain real estate in fee, provided that if he should die without child or children, then such real estate "shall be divided equally among my grandchildren, share and share alike." Held, that the limitation over to the grandchildren, was a valid executory devise, and that on the death of this son without leaving child or children, the grandchildren took the real estate by virtue of such executory devise. *Sherman v. Sherman*, 8 Barb. 385. Testator devised lands to T., his heirs and assigns, forever, provided that said T. should not sell the same within fifteen years, unless to one of his children; and in case T. died without lawful issue, the estate then to go to A. and his heirs. Held, that the devise to T. was subject to two conditions, and if he sold to one of his brothers within fifteen years, or to any other person after that time, the grantee in either case would take subject to the other condition, that is, the death of T. without lawful issue. *Hill v. Hill*, 4 Barb. 419. Where lands are devised without words of perpetuity, and in consideration thereof, the devisee is charged personally with the payment of money, he takes a fee by implication; and such, it seems, is also the rule where, in addition to the personal charge, the legacy is made a lien on the land devised. *Tator v. Tator*, 4 Barb. 431. Where there is no personal charge, as a consideration for the devise, and the charge is on the land exclusively, the life estate is not enlarged into a fee; but a fee cannot be taken by implication, where the estate is described in the will to be otherwise. *Ib.* A will directs real estate to be sold, the proceeds to be invested, and the income to be applied to the support of two nieces, until they arrive at the age of twenty years; or are married, the income to be then paid to them in equal proportions during their respective lives; the whole income on the death of either without issue, to be paid to the survivor; on the death of both leaving issue, the whole trust fund to go to such issue, one moiety to the children of each; and on the death of the

1830. *Covenhoven v. Shuler* in the will. And where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words. The strict grammatical sense is not

nieces without issue, the property to go to the mother of the testator; held, that the nieces took immediate vested interests in their respective moieties of the income during their lives, with remainder to the survivor for life in the moiety of the other dying without issue; and on the death of both, leaving issue, the fund went to their children. *Kane v. Gott*, 24 Wen. 641. A will may be void in part and yet good for the residue; and such portions of it as are not contrary to law will be saved. *Ib.* A testator by will, after giving to his wife during her widowhood the income and profits of certain lands, devised the latter to R., his daughter, and the heirs of her body forever, from and after the decease or re-marriage of the wife, with a limitation over to the children of one N. in case R. died without issue; held, that R.'s interest under the will was not a mere life estate, with remainder to her issue, but a fee simple. *Grout v. Townsend*, 2 Hill, 554. A. devised and bequeathed to B. all his real and personal property in trust to sell and dispose of the same, and out of the proceeds to pay debts and legacies, the residue to belong to B.; but the will contained no provision entitling the latter to the actual possession of the land, or authorizing him to receive the rents and profits; held, that under the revised statutes, B. took no estate whatever in the land, and consequently his widow was not entitled to dower. *Germond v. Jones*, 2 Hill, 569. A devise of lands, where there are no words of perpetuity, gives only a life estate, and a fee will not be implied from a direction to the devisee to pay the debts of the testator, where such payment is not made a condition to the devise, or declared a personal charge upon the devisee. *Van Alstyne v. Spraker*, 18 Wen. 578. Where a testator devised one portion of his real estate to a son named Joseph, and another portion to another son named Medcef, and ordered, if either of his sons should die without lawful issue, that his share or part should go to the survivor; it was held, that the right of Medcef in the share devised to Joseph, during the life time of Joseph, was a mere naked possibility, and was not assignable or releasable. *Jackson v. Waldron*, 18 Wen. 178. Where the disposition made by a testator of his property is contrary to the rules of law, as to the estates granted by him, courts, for the purpose of carrying into effect the general intent of the testator as far as possible, (ex pres,) adopt that construction of the devise which will most nearly conform to the general intent of the testator, though in part it defeats his particular intent; thus, in this case the particular intent was to give the grandson only a life estate, but inasmuch as the remainder over to the great grandson was void, the court, for the purpose of effecting the general intent of the testator, the continuing the estate in his descendants as long as the rules of law would permit, gave such a construction to the devise as to give a life estate to the son, and an estate

always regarded; but the words of the will may be transposed to make a limitation sensible, or to carry into effect the general intent of the testator. (11 Ves. 148. 1 Paige's

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in tail to the grandson of the testator. *Jackson v. Brown*, 12 Wen. 437. Where a deviser in and by his last will and testament devised and bequeathed all his estate, real and personal, to two daughters, equally to be divided between them as tenants in common in fee, and charging the same with an annuity to their mother during her life, adds, "notwithstanding the former devise for the benefit of my wife and daughter, I empower my executors to do all acts and execute all instruments which they may consider requisite to the partition of my landed estate, and I devise the same to them as joint tenants, to be by them sold at such time and in such manner as they shall think most for the interest of my daughters;" it was held, that the devise to the executors gave them a legal estate in fee. *Bradstreet v. Clark*, 12 Wen. 602. Where the provisions of a will are so repugnant that they cannot stand together, the last provision will prevail. 1b. Where a testator devised certain real estate in these words: "unto the heirs of my son Joel W., deceased, viz. Nathan, William Henry and Nehemiah, sons, and Lucinda and Mary, in proportion of three shares to the sons and one share to the daughters," it was held, that each son was entitled to take under the will three parts and each daughter was entitled to one part of the premises devised. *Thompson v. Wheeler*, 15 Wen. 840. No technical words are necessary to devise a fee, and where a man devised to his wife all his estate, real and personal, that he might be in possession of at his decease, to be at her absolute disposal; held, that the wife took an estate in fee, not by implication, but by force of the words, "all my estate to be at her absolute disposal." *Jackson ex dem. Herrick v. Babcock*, 12 J. R. 339. H., in 1784, devised his estate to M. and to the heirs of her body lawfully begotten, and for default of such heirs to S. and the heirs of his body, &c.; held, that the estate tail so devised to M. was by the act of the 12th July, 1782, (sess. 6, c. 2.) for abolishing entails, and which operated prospectively, converted into a fee simple, and M. being illegitimate and dying without issue, the estate escheated. *Jackson ex dem. Hicks v. Van Zandt*, 12 J. R. 169. A. devised a farm to his sons J. and E., equally to be divided between them, and for them to pay legacies to his daughters of twenty pounds each, and then added, "to be paid by my executors out of my money and movables, the debts to be paid out of the estate, and I shall dis seize of," held, there being no apt words of limitation, that the devisees took an estate for life; and the charge as to the payment of the debts, being upon the land, and not on the persons of the devisees, no estate in fee could arise by implication. *Jackson ex dem. Townsend v. Bull*, 10 J. R. 148. A contingent charge on the estate devised, will not carry a fee. *Jackson ex dem. Harris v. Harris*, 8 J. R. 141. A. devised as follows: "As touching such worldly estate wherewith it has pleased God to bless

1830. R. 343.) In *Jesson v. Wright*, (2 Bligh's R. 56,) Lord
 Covenhoven Redesdale says, "It cannot at this day be argued, that
 v. because the testator uses in one part of his will words hav-
 Shaler. ing a clear meaning in law, and in another part other words
 inconsistent with the former, that the first words are to be
 cancelled or overthrown." Testing the will in this case
 by these principles, I think the widow of the testator is
 entitled to the use of the whole estate during her life or
 widowhood. The general intent of the testator appears
 to have been to give one third of his personal estate to his
 wife absolutely, and the use of one third of his real estate
 for life in lieu of dower if she married a second time; and
 to give her the use of the whole estate for life if she re-
 mained his widow. He undoubtedly supposed if she re-
 mained single that she would support and educate her
 children out of the income and profits of the estate, until
 they were able to provide for themselves. There was lit-
 tle probability she would do injustice to any while there
 were no other claims on her bounty; and at her death,
 he intended they should share the property equally. It
 was, *however, necessary to provide for the contingency
 of a second marriage, when the property would be no
 longer under her control, but under that of her husband.
 The devise to her of the use of all the residue of the per-
 sonal estate and the occupation of the farm so long as she
 remained his widow, is clear and explicit, and is expressed

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me, I give, devise, and dispose of the same in the following manner and
 form;" he then enumerates certain specific legacies, and devises to his son
 all this certain lot of land, which I now possess, with the farm, utensils,
 &c., and adds, "all these legacies before mentioned to be paid on the 1st
 May, 1805, and to be raised and levied out of my estate," and then ap-
 pointed his son H. and another person, his executors; H. takes only an es-
 tate for life, for the charge, being on the testator's estate generally, it is
 contingent as to the real estate, that is, the personalty must be exhausted
 before the real estate can be resorted to. Ib. If land be devised to an-
 other with directions to him to pay a gross sum out of it, the devisee takes
 an estate in fee without any other words, though the sum to be paid does
 not amount to a year's rent of the land, and though the payment may be
 postponed. *Jackson ex dem. Decker v. Merrill*, 6 J. R. 185.

in language which can bear only one construction. The subsequent clause of the will, which was intended to provide for the contingency of a second marriage, is not so clear. The testator does not seem to have contemplated the possibility of her surviving him, and remaining unmarried until the youngest child, then an infant, became of age. He therefore directs that after her marriage, she shall only have the use of one third of the estate; from which time the income of the other two thirds was to be applied to the maintenance and education of the children; and that share of the estate was also in that case to be divided among the children equally, when the youngest became of age. If the last provision in the will can be considered as evidence of the final intention of the testator, a principle which I consider more fanciful than sound, it is in favor of the widow in this case; because the last declaration of the testator recognizes the devise and bequest before made to his wife, and declares that the same is intended to be in lieu of, and in extinguishment of her dower. As the contingency has not yet happened which was to deprive her of the use of any part of the estate, the complainants cannot claim a division of the property until her death or marriage. There can be no doubt of the right of the children of the testator by his wife Lena to the whole of the property, on the death of their mother, except the one third of the personals given to her absolutely. They take it by necessary implication, though not by the express words of the will. Where there is a bequest for life, or other limited period, with a limitation over, of specific articles, such as books, plate, &c., which are not necessarily consumed in the using, the first taker was formerly required to give security that the articles should be forthcoming on the happening of the contemplated event. And the remainderman must take them in the situation in which they will be left by the ordinary prudent use thereof by the first taker. (*Hale v. Burrodale*, 1 Eq. Ca. Abr. 361. *Bracken v. Bently*, 1 Rep. in Ch. 110.) The mod-

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ern practice in such cases is only to require an inventory of the articles, specifying that they belong to the first taker for the particular period only, and afterwards to the person in remainder; and security is not required, unless there is danger that the articles may be wasted or otherwise lost to the remainderman. (*Foley v. Burnell*, 1 Bro. Ch. Ca. 279. *Slanney v. Style*, 3 Peere Wms. 386.) Whether a gift for life of specific articles, as of hay, grain, &c., which must necessarily be consumed in the using, is to be considered an absolute gift of the property, or whether they must be sold and the interest or income only of the money applied to the use of the tenant for life, appears to be a question still unsettled in England. (3 Ves. 314. 3 Mer. 194.) But none of these principles, in relation to specific bequests of particular articles, whether capable of a separate use for life or otherwise, are applicable to this case. Where there is a general bequest of a residue, for life with a remainder over, although it includes articles of both descriptions as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life. This distinction is recognized by the master of the rolls, in *Randall v. Russell*, (3 Mer. R. 193.) He says, if such articles are included in a residuary bequest for life, then they are to be sold and the interest enjoyed by the tenant for life. This is also recognized by Roper and Preston as a settled principle of law in England. (Prest. on Leg. 96. Roper on Leg. 209. See also *How v. Earl of Portsmouth*, 7 Ves. 137, and cases in notes.) The case of *De Witt v. Schoonmaker* (2 John. R. 243) seems to be in collision with this principle. But Mr. Justice Tompkins, who delivered the opinion of the court there, does not appear to have noticed the distinction between the bequest of a general residue, and the bequest of specified articles. He says, however, it was the duty of the executor on the death of the widow, to have paid

and delivered the personal estate to the residuary legatee. If such was their duty, they were not bound *to deliver the principal of the estate into her hands without requiring security that it should be preserved and paid over to the residuary legatee after her death. That case was correctly decided; for it was manifestly the intention of the testator that the property should be delivered over to the son, after the death of the widow, and that he should pay the legacy to his sister. The court presumed he had received the property agreeably to the directions of the will, and the executors were held not to be liable to the legatee in a court of law.

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In the case before me, the widow was not entitled to the use or possession of any specific article of the personal estate; but only to one third of the principal, and the interest or income of two thirds of the remainder, of the general residue, after the debts of the testator and the legacy to Mrs. Cady were paid or satisfied. The complainants are therefore entitled to an account of all the personal estate of the testator, in value as it existed at the death of their father; and after deducting the legacy to Mrs. Cady and the funeral charges and the expenses of administration, their share of the balance must be invested in permanent securities, and the income thereof paid to Lena Shuler during her life or widowhood; and the principal, after her death or marriage, must go to the complainants.

I have stated the rights of these parties in the hope that some arrangement may be made for the settlement of these family difficulties, without the necessity of any further litigation; and I have formed no definite opinion as to the question of costs on either side. But no decree for an account can now be made, as all the proper parties are not before the court. It appears by the pleadings that the testator left other children, besides those by Lena Shuler who were the residuary devisees and legatees in remainder. Jeremiah, one of the children of Lena Shuler,

1830. died after his father ; and under the provisions of the will he took a vested interest in remainder in the personal as well as the real estate. (*Sturges v. Pearson*, 4 Mad. Rep 411. *Benyon v. Maddison*, 2 Bro. C. C. 75. *Preston* or *Leg. 70. 1 Roper on Leg. 376. 2 Dessaus. Rep. 295.*
- [*134] In that share of the estate John Shuler *and Mrs. Cady and the other brothers and sisters of the half blood, if there are any, are equally entitled with those of the whole blood. The cause must therefore stand over, with leave to the complainants, or such of them as have not released their interest to their mother, to file a supplemental bill for the purpose of bringing the personal representative of Jeremiah Shuler before the court, or such other persons entitled to a distributive share of his estate as are not now parties. Those who have conveyed all their interest in the real and personal estate to their mother, since the death of Jeremiah, have no interest in the account to be taken, and need not be parties.

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If the specification annexed to a patent is sufficiently explicit to enable a skilful mechanist without any other aid to construct the patent invention, the patent will not be void although some of the minor details of the machine should not be set forth at large.

But the patent is void if the machine will not answer the purpose for which it was intended without some addition, adjustment or alteration which had not been discovered or invented at the time the patent was issued.

Where a patent is granted for an improvement in machinery, a drawing of the improvement as well as a specification is required.

The drawing may be referred to for the purpose of aiding a specification, which otherwise would be imperfect.

It may also be referred to as evidence to show that the machine claimed under the patent is not the one for which the patent issued.

The circuit court of the United States alone has jurisdiction of suits to recover damages for the infringement of patent rights.

The judicial power of the United States extends to all cases arising under the constitution and laws of the general government; but the federal courts can only exercise judicial power in cases in which it has been delegated to them by the laws of congress.

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The act of the 15th of February, 1819, extended the jurisdiction of the circuit courts of the United States to suits both at law and in equity arising under the patent laws; but it does not render the jurisdiction of those courts exclusive in such cases.

Where an assignee of a patent right sold the same, and at the time of the sale exhibited a machine as the one which he then supposed to have been patented, but which afterwards was discovered to be different from the one actually patented, as described in the specification, the deed of assignment and a note given for the purchase money, and an accompanying agreement in relation to the sale of the patent right, were ordered to be delivered up and cancelled; the whole transaction having been founded upon a mistake as to a matter of fact. It was also held that the vendee was not entitled to the damages which he had sustained in consequence of such purchase; but that if any part of the purchase money had been paid, he would have been entitled to have the same refunded.

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The bill in this cause was filed in 1826. It stated, April 6th. among other things, that in March, 1823, the defendant, for the consideration of \$500, sold to the complainant the exclusive right and liberty of making, using and vending "Ballou's patent improved threshing and winnowing machine," for the counties of Ontario and Yates; and that the defendant in the assignment covenanted that he had authority to convey such exclusive right; and warranted the same right to the complainant, his heirs and assigns, for the term of 14 years from the date of the patent, which was granted to Seth Ballou in December, 1821. The bill further stated that by a further agreement made at the time of the sale, the complainant was to hold one half of the right for his own use and profit, and one half for the use and profit of the defendant; for which the complainant was to account to him, reserving 25 per cent. of the profits for his services; that at the time of the sale and agreement the defendant had in his possession and exhibited a machine, which he alleged was constructed according to the specification in Seth Ballou's patent, and was a

1830. model by which the machine sold could be made ; that
Burrall relying upon the truth of the defendant's representation,
V. he (the complainant) was induced to make the purchase
Jewett and agreement ; and he thereupon gave his note to the
defendant for the consideration money, payable in five
years with interest annually from the 1st of August, 1823.
The bill further stated that the complainant, after such
purchase, discovered that the representations made by the
defendant in relation to the machine were false and de-
ceptive ; and the complainant charged in his said bill
that the same were made with the intention of deceiving
and defrauding him ; that he procured from the city of
Washington an exemplification of the specification an-
nexed to Seth Ballou's patent, and ascertained that the
machine exhibited and sold to him by the defendant as
Ballou's patented machine, was *entirely different in con-
struction and operation from the one which was patented
to Ballou, as described in the said specification ; that he
(the complainant) purchased the right and made the agree-
ment under the full belief that he was acquiring the ex-
clusive right to make, use and vend a valuable and pa-
tented improvement in the machine for threshing, &c.,
and with the expectation of profits which would arise
from the re-sale of the right to make and use the same.
The complainant also charged in his bill that the defend-
ant at the time of the sale had in his possession a copy of
the specification of Ballou's patent, and knew that it
did not describe a valuable improvement, and knew that
the machine exhibited to the complainant was not con-
structed according to, nor protected by the said specifica-
tion and patent ; that the complainant, before he ascer-
tained the machine was not covered by the patent and
specification, had expended money, time and labor in
preparing materials and making machines which he was
obliged afterwards to sell at cost, without receiving any
compensation for his labor and services. The bill further
stated that the defendant had been requested to deliver

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up the note and agreement to be cancelled, and to account with the complainant for his damages; which was the particular prayer of the bill. The bill also contained a prayer for general relief.

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The defendant in his answer admitted the sale and agreement as mentioned in the bill. He also stated that in October, 1822, P. Garcelon, the assignee of Ballou's patent, came to his residence in Saratoga county and exhibited a model of the machine, and offered the same for sale; and that he constructed a machine after such model, which the defendant considered a valuable improvement; that he, the defendant, thereupon purchased of Garcelon the right for the counties in the eastern and western senatorial districts, excepting three or four counties in the then eastern district; that he, the defendant, after such purchase, constructed two machines similar to the one made by Garcelon, and agreeably to the directions given by him; one of which was the machine shown to the complainant, and which the complainant saw several times in operation. But the defendant *denied that he represented to the complainant that the machine was constructed according to the specification and description of Ballou's patent improved threshing and winnowing machine; that he had with him Garcelon's printed directions for constructing the machines, by which he told the complainant the machine there exhibited had been constructed; which printed directions he, the defendant, left with the complainant. The defendant further stated in his answer, that he had not at that time seen the specification upon which the patent issued, nor did he then inform the complainant that he had such specification; that Garcelon did not exhibit the specification at the time the defendant purchased from him, but he promised to send to the defendant a copy of the same, which he had never done. The defendant denied that he represented to the complainant that the machine was an original invention, although he at the time thought and still believed it

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1880. was so, and he also believed that the patent was good and
 Burrall valid. That he, the defendant, exhibited to and left with
 v. the complainant a printed copy of the patent without the
 Jewett specification, and gave to him all the information he pos-
 sessed in relation to the machine and the right to the
 same; but the defendant denied that he made any mis-
 representation to the complainant, or that he intentionally
 concealed any thing from him in relation thereto. And
 the defendant in his answer insisted that the machine ex-
 hibited to the complainant was covered and protected by
 the patent; and that the complainant by his purchase ac-
 quired the exclusive right to make, vend and use the same
 for the counties of Ontario and Yates. The defendant
 also stated in his answer that he had understood and be-
 lieved that the complainant had, from the machine sold
 to him by the defendant, constructed a machine for
 threshing and cleaning clover seed, which was an in-
 fringement of Ballou's patent; that the complainant had
 obtained a patent for such clover machine, and had made
 considerable profit by the sale of the right to the same;
 and that the complainant was attempting to invalidate
 the patent for the threshing machine, to prevent its being
 brought in collision with his clover machine. The de-
 fendant also insisted that the matters of the complainant's
 [*188] *bill were not such as entitled him to any relief in this
 court; and he prayed for the benefit of the objection in
 like manner as if he had demurred to the bill or pleaded
 the said matter in bar of the suit. A general replication
 was filed to the answer of the defendant, and several wit-
 nesses were examined on both sides. The cause was
 heard upon pleadings and proofs.

B. F. Butler and *C. Butler*, for the complainant. The
 complainant was fraudulently drawn into the contract
 which he now seeks to avoid. The defendant soon after
 the sale, if not before, knew that the patent and specifica-
 tion did not cover the machine exhibited. If there was

no intentional deception on the part of the defendant, yet the sale is void because the machine sold was not patented. Although the complainant might have sued at law for the breach of the contract, yet he is liable to a suit on the note; and there being either fraud or mistake in this case, he may apply in the first instance in equity to have the contract, note, and agreement set aside. Notwithstanding the validity of patents is only triable in the federal courts, yet this court has jurisdiction in cases of fraud for selling, for any particular district, a machine as patented which is not so. The complainant is entitled to the relief specifically prayed for in his bill, and which can only be granted by a court of equity; that is, to have the whole transaction set aside, and to recover all the damages sustained by him in consequence thereof. The counsel cited 1 Mad. Ch. Rep. 262; *Rosevelt v. Fulton*, (2 Cowen's R. 132;) *Bacon v. Bronson*, (7 John. Ch. R. 200;) *Rathbone v. Warren*, (10 John. R. 587;) *King v. Baldwin*, (17 id. 384;) *Langdon v. Degroot*, (1 Paine's R. 203;) *Lowell v. Lewis*, (1 Mason's Rep. 182;) *Barrett v. Stearns*, (1 id. 447;) *Woodcock v. Parker*, (1 Gallison's Rep. 439;) *Whittemore v. Cutler*, (1 id. 478;) *Ordion v. Winkley*, (2 id. 51;) *Evans v. Evans*, (1 Peter's C. C. R. 323; 3 Wheaton's R. 354, S. C.); *Sullivan v. Redfield*, (1 Paine's Rep. 451;) Fessenden on Patents, 130, 178; *Gray v. James*, (1 Peter's C. C. Rep. 394;) *Hayne v. Maltby*, (3 T. R. 438;) *Bellas v. Hays*, (5 Serg. and Rawle, 427;) *Tyler v. Tuel*, (6 *Cranch's Rep. 324;) Fessenden on Patents, 233; *Whittemore v. Cutler*, (1 Gallison's Rep. 429;) *Parsons v. Barnard*, (7 John. R. 144.)

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H. Bleecker and *J. Thompson*, for the defendant. The specification upon which the patent was issued is sufficient. If not sufficient, it is manifest that the deficit did not proceed from any intention to deceive the public, and therefore does not avoid the patent. The defendant is entirely innocent of the charge of fraud. He communicated

1830. to the complainant every thing he knew about the patent.
 Burrall The purchase of the patent right by the complainant
 v. has been or might have been valuable to him ; and his
 Jewett remedy, if any, is at law. This court cannot interfere.
 The patent has not been avoided according to the laws of
 the United States. Until this is done, a want of consider-
 ation cannot be shown by the complainant. This court
 cannot try the validity of a patent. The counsel cited
 Fessenden's Law of Patents, 174 ; 306, 317, 346, 370, 386 ;
 388, 2d ed. ; *Sullivan v. Redfield*, (1 Paine's R. 450 ;)
Whittemore v. Cutler, (1 Gallison's R. 429 ;) *Lowell v.*
Lewis, (1 Mason's R. 189 ;) Collection of Patent Cases,
 307 ; *Chesterman v. Gardner*, (5 John. Ch. R. 32 ;) *Kemp-*
shall v. Stone, (5 id. 193 ;) *Abbot v. Allen*, (2 id. 519 ;)
Hatch v. Caleb, (4 id. 559 ;) *Parsons v. Barnard*, (7 John.
 R. 144.)

THE CHANCELLOR. This suit cannot be sustained on the
 ground assumed in the first point of the complainant.
 The charge of fraudulent misrepresentation and conceal-
 ment is fully denied in the answer ; and there is nothing
 in the proofs in the case to induce the court to believe the
 answer in this respect is not strictly true. The testimony
 of Jones is calculated to support this part of the answer
 rather than to impeach it. The rights were sold early in
 the spring, and some time in the summer thereafter the
 defendant showed the specification he had subsequently
 obtained from Washington to Jones, who then explained
 to him the defects therein. This appears to have been the
 first intimation or suspicion Jewett had that the machines
 made and exhibited by him did not agree therewith.
 [*140] Jones says the defendant finally assented *to the correct-
 ness of his assertions, that the machine was not constructed
 according to that specification ; but requested him not to
 mention it to the complainant. This concealment of a
 fact discovered long after the agreement and sale, could
 not make the original transaction fraudulent. If the

patent is invalid for want of a proper specification, I am satisfied the defendant did not suspect it at the time of the sale. I shall therefore proceed to examine whether the machine which both parties supposed was patented to Ballou, was in fact covered and protected from infringement under the patent of December, 1821; and if it is not thus covered and protected, whether the complainant is entitled to the specific relief prayed for in his bill, or to any other relief in this court against the defendant.

On looking into this case, soon after the argument, I became satisfied it was important to a correct understanding of the subject that the court should be furnished with copies of the patent, and of the petition, specification and drawings upon which the same was granted. I therefore suspended the decision of the cause for thirty days, to give either party that might think proper to do so, an opportunity to procure the exemplifications from the patent office, and to file them with the register. And I also gave permission to either party, after those exemplifications were produced, to apply for the further examination of witnesses, in connection with the exemplifications, if they should think it necessary. The exemplifications were accordingly produced by the defendant, and neither party has asked for leave to take any further testimony. And it is probable no testimony could have been produced which would have altered the result. The whole of the petition is recited in the patent; and the drawing corresponds with the specification which was exhibited to the witnesses on their examination.

The petition stated that Seth Ballou of Livermore, in the county of Oxford and state of Maine, the petitioner, had invented, constructed and applied to use a new and useful improvement in threshing, sifting and winnowing wheat, rye, oats, and all kinds of small grain; also grass, flax, and all other articles from which the seed might be obtained by threshing *by machinery, at one operation; the machine being called Ballou's threshing machine, con-

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structed agreeably to the accompanying specification. In the specification, that part of the machine which is the subject of controversy is thus described: "Upon a frame fitted for supporting the machine, there is a large wheel, of any convenient dimensions, say $4\frac{1}{2}$ feet in diameter, to the centre of which a crank is affixed for the purpose of turning it by hand. A band passes around this wheel, and also around a whurr or small wheel, say 8 inches in diameter, which is affixed to a large cylinder, say 2 feet in diameter and 2 feet 8 inches in length, or it may be larger or smaller according to the dimensions of the whole machine. This band is to give motion to the cylinder. In this cylinder are put four or any convenient number of rows of cogs, equally distant from each other. The cogs in each row occupy one half the space in the length of the cylinder; that is, a space is left between each, equal to that occupied by a cog. These cogs are an inch and an half in diameter and two inches in length, or they may be larger or smaller with equal effect. Care however must be taken to place those of the second row so as to follow the spaces in the first row; and in the same manner all the other rows, be they more or less. The office of these cogs is to beat the grain from the straw. Directly over this cylinder, or, which is preferred, about eight inches upon the surface from the top, down the side of the cylinder, a hopper or feeder is placed within a short distance, say half an inch, of the cogs, with a narrow opening at the bottom sufficient for the admission to the cylinder of the article to be threshed; which opening may be gauged to any convenient space. Around the under half and fore part of the cylinder there is a casting which is called the barrel, placed within half an inch of the cogs. Immediately in rear of the cylinder are flyers, constructed as follows," &c. The manner in which the operation is performed is thus described in the specification: "The machine being put in motion, the grain or substance to be threshed is to be put into the hopper or feeder, and im

mediately comes in contact with the cogged cylinder, and is thus thoroughly and completely beaten from the straw. The *whole passes under the cylinder, is then taken by the flyers and thrown back upon the sieve, through which the grain passes," &c.

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At the time of the sale to the defendant, by Garcelon, and of the sale by the former to the complainant, printed copies of the original patent, without the specification, were exhibited; at the bottom of which was also printed, "For the schedule and improvement, see machine and directions." The printed directions, which were also produced and shown at the same time, corresponded with the machines then exhibited. The cylinder and apron or barrel were constructed thus: In the cylinder there were six rows of teeth projecting nearly two inches therefrom, and so set that the teeth in every row would, in the revolutions of the cylinder, follow some of those in the first row and pass between corresponding teeth placed in the apron or barrel; so that in passing between each other, the teeth in the revolving cylinder and those in the apron or barrel were three sixteenths of an inch apart. On the part of the defendant, it is insisted that this is the manner in which the machine is to be constructed by the specification, and that every alternate row of cogs should be inserted in the apron or barrel; and some witnesses have been made to say this is the way a skilful mechanic would make the machine from the specification. It is undoubtedly a correct rule in relation to patents that if the specification is sufficiently explicit in its details to enable a skilful mechanist to construct the patented improvement or invention, without any other aid, it is not to be considered void because some of the minor details of the machine are not set forth at large. As in the case, the revolving cylinder is to be put in motion by means of a whurr on one end of the gudgeon, and by a large wheel turned with a crank. If the patentee, through inadvertence, and without any intention to deceive the

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public, had neglected to mention that a band was to pass around the whurr and the large wheel, the specification would have been sufficient; that being the the common and well known mode of performing the operation, which any person acquainted with machinery would at once supply. (*Gray v. James*, 1 Peters' C. C. R. 394. *Crossley v. Beverly*, 3 Car. & Payne, 513.) But the *patent is void if the machine will not answer the purpose for which it was intended, without some addition, adjustment, or alteration, which the mechanic who is to construct it must introduce of his own invention; and which had not been discovered or invented by the patentee at the time his patent was issued.

In this case, there is sufficient evidence that the placing of cogs or teeth in the apron or barrel, in addition to those in the revolving cylinder, was in use at the time the defendant purchased of Gracelon, and previous thereto. But there is no evidence that the patentee had made that improvement or discovery at the time his patent issued.

The patent law of the United States requires a drawing as well as a specification in cases of machinery; and the drawing may be referred to for the purpose of aiding a specification which would otherwise be imperfect. (*Blossam v. Elsee*, 1 Car. & Payne's Rep. 558. *Earle v. Sawyer*, 4 Mason's R. 1.) As the drawings may be referred to for the purpose of aiding the written specification, to support the patent, it seems to follow that it may be resorted to by the adverse party to explain any thing which is doubtful or ambiguous in the written description; or for the purpose of showing that the machine in question is not the same as that for which the patent was obtained. The written description says that, in the cylinder, there are to be put four or any convenient number of cogs, equally distant from each other, and in size equal to the distance between them. Nothing is said of any cogs or teeth in the barrel or apron. But it is contended on the

part of the defendant that each alternate row of cogs is to be inserted there, as the machine would be useless without them. On examination of the drawing, there are two rows of cogs exhibited on the cylinder, so placed as to require two more rows thereon to make them equidistant, as stated in the specification; and there is nothing in the drawing to show that any corresponding cogs or teeth are to be inserted in the barrel. Indeed, if the cogs in the cylinder are inserted as directed in the specification, it would be impossible for it to revolve on its axis if similar cogs were also inserted in the barrel. The spaces between the cogs being equal to the size of a cog, and those of the second row being placed so as to fill the spaces between those in the first, would occupy the whole length of the cylinder, and would necessarily strike against and be stopped by the cogs inserted in the barrel. If the witnesses could make a valuable threshing machine from this specification, similar to the one actually sold, it must be by their own ingenuity and invention, and by going directly contrary to the directions therein contained. The court cannot be governed by the opinions of witnesses, however intelligent and respectable they may be, when those opinions are contradicted by the facts which are indisputable. I am therefore compelled to decide that the machine sold by Gracelon to the defendant, and by the latter to Burrall, is not the same machine described in the petition and other papers on which the patent to Ballou was granted. It is satisfactory also for me to know that the conclusion at which I have arrived corresponds with the decision which my learned predecessor was prepared to make, if the parties had consented to have that decision entered *nunc pro tunc* after he had resigned the office of chancellor. There is no evidence from which I have been able to form a satisfactory opinion whether the machine, in its present perfect and useful form, was the one for which the patent was intended to be taken out. But as it differs so mate-

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Jewett.

rially from the specification and drawings, which hardly could have been the effect of accident, and from the expression at the foot of the printed copy of the patent, "For the schedule and improvement, see machine," I am inclined to the opinion that the insertion of teeth in both the barrel and cylinder, instead of cogs in the latter only, was an improvement upon the original machine, made after the papers were prepared, in September, 1821. If such was the case, this important and valuable improvement of the original machine should have been secured by a new patent for the same. In the absence of that, there is no evidence that the patentee was the original inventor of that improvement. His oath only extends to the machine described in his specification and drawings.

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Much was said on the argument to show that Burrall's clover machine did not vary in principle from the machine *purchased of Jewett, which was also intended to be used for the same purpose. But it is not necessary for the decision of this cause to inquire as to the validity of Burrall's patent. If his machine does not differ in principle from the other, but merely in its proportions, the patent is void. If he has made a material and useful improvement on the original machine, he is entitled to a patent for that improvement only. He has no right to use an original patented machine in connection with such improvements, without the consent of the owner.

An objection has been made to the jurisdiction of this court on the ground that the federal courts alone have the power to pronounce upon the validity of a patent. Where a suit is brought to recover damages for the infringement of a patent right, the defendant is entitled to set up the invalidity of the patent as a defence to the action; and if he succeeds in establishing such defence, the court is to give judgment for the defendant, and to declare the patent void. An action of this description must therefore be brought in the circuit court of the United States, which alone has jurisdiction to give the proper remedy to either

party. (7 John. R. 144.) The fifth section of the patent law of 1793 authorized the action for damages for the infringement of a patent to be brought in the circuit courts of the United States, or in any other court having competent jurisdiction. This, however, was found to be inconsistent with the power to declare the patent void conferred by the sixth section; and in the act of April, 1800, the fifth section of the former law was repealed and another one substituted, giving jurisdiction in such a case to the circuit court only. (Laws of United States, vol. 5, p. 88, § 3.)

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The judicial power of the United States extends to all cases arising under the constitution and laws of the union; but the federal courts cannot exercise that judicial power except in those cases where it has been delegated to them by congress. (1 Paine, 45.) The act of the 15th February, 1819, extended the jurisdiction of the circuit courts of the United States to suits both at law and in equity arising under the patent laws; but there is nothing in that act which, either in terms or by necessary implication, renders that jurisdiction *exclusive. Under the judiciary act of 1789, where it was intended to give exclusive jurisdiction to the federal courts, it is so stated in express terms.

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The remaining question is, to what relief is the complainant entitled on the facts disclosed in the pleadings and proofs? No recovery can be had upon the warranty contained in the deed of assignment of the 10th of March, 1823. That was an assignment of the machine patented to Seth Ballou in December, 1821. The right to that machine actually passed by the assignment, and was protected by the patent. But it was materially different from the machine exhibited, which both parties then supposed was patented, which was the real object of sale and purchase. The real subject of sale is not warranted by that deed, and no recovery can be had thereon for the defect of title to the patent right intended to be sold and

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conveyed thereby. In *Bliss v. Negus*, (8 Mass. R. 46.) a promissory note had been given upon an assignment from a prior assignee of certain rights in a patent. Upon the trial, it appeared that the original patent was void; but there was no evidence that the plaintiff was acquainted with the fact at the time he sold to the defendant. As the plaintiff lost nothing and the defendant acquired nothing by the deed of assignment, the note in that case was held to be without consideration and void. The same principle is recognized in *Hayne v. Malby*, (3 T. R. 438,) and in *Ballas v. Hayes*, (3 Serg. & Rawle, 427.) In this case, the other agreement made at the time of the sale must be considered as part of the same contract; and the whole being founded on a mistake as to matter of fact, it would be unjust and inequitable to compel the complainant to carry the contract into effect. The note, deed of assignment, and the accompanying agreement in relation to the sale of patent rights, must be delivered up and cancelled. But the complainant is not entitled to recover any damage which he may have sustained in making machines. All the witnesses agree that the machine was valuable in itself. Independent of any exclusive right, with ordinary care and diligence it would sell to farmers for enough to pay the expenses of constructing it, together with a reasonable profit to the mechanist. The only loss, from the *mistake of the parties as to the real state of the case, therefore appears to be the increased price which might have been expected as a compensation for the supposed exclusive right. Even if actual damage has been sustained, I know of no principle of law which can authorize one party to recover damage from another in such a case, where neither was guilty of any fraud. If Jewett had been benefited, or had received any thing under the agreement, there might be some ground for calling upon him to refund what he had received.

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If the complainant, after he had discovered the difference between the specification and the machine purchased

by him, had simply asked for a return of the note and to have the agreement cancelled, and had confined himself to that in his bill, I should have been disposed to charge the defendant with costs. But he asked for more than he was entitled to; and by his bill in this cause has endeavored to sustain the whole of that claim by charging the defendant with a fraudulent misrepresentation and concealment. In that part of the suit he has entirely failed. I therefore think it a case in which, upon the principles of equity, each party should bear his own costs.

1880.
Scribner
v.
Crane.

SCHEMME v. CRANE AND OTHERS.

No person should subscribe his name as a witness to a will until he is clearly satisfied that the testator is possessed of a sound and disposing mind and memory; and that in executing his will he acts understandingly, and with a full knowledge of its contents.

This was an appeal from the sentence of the surrogate of the county of Westchester. The appellant propounded a testamentary paper as the last will and testament of Martha Williams deceased, in which he was named as executor. The whole case turned upon the question of fact whether the decedent executed the will understandingly, and at a time when she was possessed of a sound and disposing mind and memory. Many witnesses were examined, and the surrogate pronounced against the validity of the will. From that decision the executor appealed to the chancellor. (See 1 Paige's Rep. 550, S. C.)

April 6th.

*A. Ward, for the appellant, cited 1 Swinburne, 127, (note); *Clark v. Fisher*, (1 Paige's R. 171; Starkie on Ev. 1707, note 1; Swinburne, pt. 2, sec. 5; *Vanalst v. Hunter*, (5 John. Ch. R. 158; 5 id. 161; 1 Swinb. 122, 126, 127, note, 133, 187, 8; 5 John. Ch. R. 154; Starkie on Ev. 1705.

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1680. *J. Smith*, for respondents, cited *Vanalst v. Hu*
 Scribner John. Ch. R. 158;) *Clark v. Fisher*, (1 Paige's F
 v. Collinson on Lunacy, 58, 611, note, 616, 618;
 Crane. 889; 1 id. 118, notes; Swinb. 26, note; Pothier o
 gations, 125 and 220.

THE CHANCELLOR. I think the weight of evidence in this case is decidedly against the capacity of the testatrix to make a will at the time her mark was made to the instrument propounded by the appellant. Independent of that testimony there is no sufficient evidence of the execution of the instrument. The paper propounded appears to have been drawn by the executor, who was a attending physician of the decedent, and at the house of the principal legatee named in the will. The appellants of the subscribing witnesses, and Haff and Losee and others. The two latter alone were examined. A witness knew in respect to it is that they were called in by the appellant, and found the old lady, then nearly 90 of age, lying on the bed helpless. A paper was produced, said to be her will. Scribner put a pen in her hand and guided the hand to make her mark to the instrument and then subscribed his own name as a witness, which Haff and Losee subscribed theirs. One of the witnesses says that the decedent acknowledged the will, the other says she merely nodded assent as she lay in bed. The will was not read to her in the presence of either of these witnesses, and nothing was said as to the contents thereof. One witness says no conversation was had with her to ascertain the state of her mind; that she was in the lowest state of life and human existence, and that he did not articulate any expression which he distinctly understood. The other witness says he has no doubt of the soundness of her mind, because he asked her how she felt, and she said she was very weak and distressed.

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*It is pretty evident that neither of these two witnesses had sufficient evidence of the mental capacity of

cedent, or that she knew what she was doing, to justify them in putting their names to this paper as witnesses. They both swear they relied partially, if not entirely, on the declarations of Scribner as to her capacity. They probably had no intention of doing any thing wrong, but it was in fact a fraud upon those whose rights are affected thereby to place their names to a testamentary paper under such circumstances. No person is justified in putting his name as a subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator; and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead, or is out of the jurisdiction of the court. Neither of these witnesses had sufficient knowledge on the subject to give legal evidence of the due execution of the will. The surrogate was therefore perfectly right in pronouncing for an intestacy; and his sentence and decree must be affirmed with costs.

The respondents may have execution for their costs on the appeal out of this court. But a certificate of the decree of affirmance must be sent to the surrogate, so that he can proceed and grant administration of the decedent's property and effects to such person as may be entitled to the same.

1830.

 Decker
v.
Miller

 DECKER AND TYSON v. MILLER.

An executor who is a debtor to the estate is chargeable with the amount of the debt due by him, as assets in his hands for the payment of the debts of the testator.

1839.

**Decker
v.
Miller.**

An executor is entitled, out of the assets in his hands, to retain a debt due him by the testator, in preference to other creditors of the same degree. He is also entitled to the same preference in applying the assets in the hands of his co-executor to the satisfaction of his debt.

*An executor who is indebted to the estate may refuse to pay, out of such debt, a demand claimed against the estate by his co-executor, until he is satisfied that the other assets are sufficient to discharge such demand of his co-executor.

Where such executor has a right to ask the aid and protection of the court in paying over the debt due by him to the testator, he will be entitled to his costs out of the fund.

So if the executor who was the creditor of the estate had a right of preference over other creditors, and was compelled to come into chancery to obtain such preference, his costs will be paid out of the fund.

April 6th.

THIS was a bill filed by two of the executors of Abraham Egbert against their co-executor, to compel the payment of two bonds given by the defendant to the testator; which payment the complainants alleged was necessary to satisfy the debts of the testator, and particularly a bond given to Decker, one of the complainants, as to which Decker claimed a priority of payment. The cause was heard on pleadings and proofs before Chancellor Jones, who directed an account of the debts, credits and effects of the testator to be taken; the particulars of which decree are stated in the opinion of the present chancellor. The cause now came on again to be heard on the master's report and upon the equity reserved.

J. Radcliff, for the complainants.

J. Wallis, for the defendants.

THE CHANCELLOR. It appears from the papers before me, and from the opinion of the late chancellor, that much discord and contention has existed between the executors in relation to the settlement of this estate. It is not necessary now to inquire which of the parties is most to blame in relation to those difficulties, as the decision of the late chancellor makes it proper that the costs of both

parties should be paid out of the estate. The complainant Decker was a bond creditor of the estate; and the testator was also indebted to other creditors by specialty. Miller, one of the co-executors, was indebted to the estate, and of course had assets in his hands for the payment of debts. The late chancellor decided that one of the bond debts claimed against Miller was not due from him, and that the other was assets in his hands *for the payment of debts; that Decker was entitled as executor to retain his debt in preference to the other specialty creditors of the testator; and that he was entitled to have the assets in the defendant's hands applied to satisfy such retainer for his own debt. He also decided that the defendant was not bound to pay over those assets to his co-executor, unless he was satisfied the same were required to pay the debt due to him; and that the differences subsisting between these executors, and the causes which the co-executors had given for dissatisfaction, were grounds for the defendant to require the direction and protection of this court in the discharge of his duty as executor.

If the defendant had a right to have the aid and protection of this court to enable him to pay over this debt with safety, it is a matter of course to allow him his costs out of the fund. As Decker had a right of preference, and was compelled to come here to obtain it, his costs must also be paid. Tyson was a necessary party to the suit; and the costs have been diminished rather than increased by making him a complainant instead of a defendant. In this case I think he might be brought before the court either as complainant or defendant. And the late chancellor has in effect so decided, by refusing to dismiss the bill.

I find some difficulty in ascertaining precisely what the rights of the parties are, in relation to the fund, from the incorrect manner in which the report has been made. The master was directed to take the accounts of the estate; but instead of doing that, and ascertaining what was due

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v.
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to and from each executor, he has simply reported a statement of facts which were not called for by the order of reference; and which are not sufficient to enable the court to see what is right between the parties without looking beyond the report. The parties should have excepted to the report, or have applied for a special order directing the master to execute the decree of reference, and to state the accounts as directed by that decree. In the situation in which the cause comes before me, I can only settle the principles on which the account should be stated, leaving the parties to settle the several amounts and insert them in the decree, if they can *ascertain them by computation from the facts stated and admitted by the pleadings and in the master's report.

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The amount of property bid off by Corson should have been applied to the satisfaction of Decker's bond, as the legacy could not be paid till all the debts were satisfied; and the same principle applies to the property which the widow was permitted to take. All the executors appear to have been in the wrong in relation to these sums, and each must be charged with one third of the loss, and with interest from the time of the sale. They must also be charged with the sums received by them respectively from other sources, and for the property bid in by them at the sale, and with interest thereon. They must also be allowed for all sums paid out in a due course of administration, with interest and commissions. And the defendant Miller must be charged the amount of his bond, and interest thereon until the time when the money was paid into court; and Decker must be credited the amount of his bond and interest. When the balance due to or from each is ascertained, Miller must pay the balance if any which is due from him, after deducting his costs; and if he has overpaid, he must be allowed the amount out of the fund in court. The balance due from Tyson must be applied in satisfaction of the complainant's costs, and the residue of those costs, together with the balance due to Decker,

must be paid out of the fund in court; and if any more of that fund remains, it must be paid to the other bond creditors rateably.

1830

Decker

v.
Miller.

If the parties cannot ascertain these amounts, it must be referred to master B. Clark to state the accounts, upon the pleadings and proofs and the evidence taken before the former master. But in that case neither party is to be at liberty to charge the costs of this new reference against the estate, as they should have had the accounts taken correctly in the first instance.[1]

[1] The whole interest of the testator or intestate in respect to the personal estate vests in the executor on the death of the testator, and in the administrator, on the granting of letters of administration, which relate back to the time of the decease of the intestate. *Valentine v. Jackson*, 9 Wen. 302. *Babcock v. Booth*, 2 Hill, 181. And if it be tortiously taken or converted, he may sue for it in his own name, without describing himself as executor or administrator. *Patchen v. Wilson*, 4 Hill, 57. Otherwise, where the executor or administrator sues on a contract made with the testator or intestate. *Ib.* An executor, previous to letters testamentary granted, cannot commence a suit; the common law rule, that he might commence an action before probate, and that it was enough if he had obtained letters testamentary when he came to declare, is changed by statute. *Thomas v. Cameron*, 16 Wen. 579. An executor by virtue of his office becomes a trustee for the devisees and creditors of the testator, when it is ascertained that the personal property of the estate is insufficient to pay the debts of the testator; and in such a case, he will not be permitted to sell the real estate of the testator under a judgment held by himself, and become the purchaser. *Rogers v. Rogers*, 3 Wen. 503. Each executor has the control of the estate, and may release, pay, or transfer, without the agency of the other. *Douglass v. Statterlee*, 11 J. R. 16. Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of the executor's duty, is to be adjudged conniving with the executor to work a devastavit, and is accountable to the person injured by such disposition directly, on a bill filed by him. *Colt v. Lamier*, 9 Cow. 320. Where the executor, being one of a trading firm, with the knowledge of the firm, mixed the funds of the testator's estate with those of the firm, and they were thus employed in trade; held, that the firm were liable for those funds to a legatee of the testator. *Ib.* And this, even admitting that the funds had been carried to the account of the executor as to these closed on the partnership books. *Ib.* The English and American cases upon this doctrine stated and commented upon, both as they respect the rights of legatees and creditors.

1880.

Decker
v.
Miller.

Ib. The executor, or if he be dead, his personal representative, should be a party to the investigation; and the cause may stand over after a hearing and opinion given upon the merits, till he be made a party. *Ib.* An administrator de bonis non, is the full representative as to all effects not duly administered; and may seek a discovery and account of them in whosesoever hands they may be, so long as they belong to the estate. *Ib.* Although his authority as to the collection of debts is limited to his jurisdiction, that is, to the state which qualifies him to act, yet, when debts are outstanding in a neighboring state, it is the executor's duty to take measures to collect them, either by taking letters of administration in the foreign jurisdiction, or getting some other person to do it; and if he neglects his duty in this respect, he will be liable personally. *Shultz v. Pulver*, 11 Wen. 584. Executors having a general power to make investments, are confined in its exercise to real and government securities, the latter including stocks of the United States and State of New-York; and they may also invest in loans to the New-York Life Insurance and Trust Co. *Ackerman v. Enott*, 4 Barb. 626. An executor, a creditor of his testator, previous to the revised statutes going into effect, had a preference over other creditors, whose claims were not of a superior dignity to his own, and might accordingly, from the assets of the estate, retain the amount due to him. *Rogers v. Hosack's Ex'rs*, 18 Wen. 319. The statute of limitations cannot be interposed in bar of the exercise of such right of retainer. *Ib.* The rule is universal, that where the remedy is suspended by the act of the party entitled to it, it is destroyed for ever. The consequence is the same, if the debtor is a co-executor with others, as in the case of a sole executor, in respect to a creditor appointing his debtor executor, for one executor cannot sue another; and if he do not renounce the trust, such appointment is an extinguishment of the debt, or the action for it, upon the ground that such must have been the intention of the testator. *Marvin v. Stone*, 2 Cow. 781. *Thomas v. Thompson*, 2 J. R. 471. But there is one qualification as universal as the rule itself; that where the testator does not leave funds sufficient for the payment of his debts, the debts due from the executor shall not be discharged; because the testator shall not be permitted, by a voluntary release, to defraud his creditors of his just claims. The debt is considered a part of the assets. *Ib.* In the latter case it is, in judgment of law, money in the executor's hands. *Ib.* The appointment of a debtor executor, is considered in the nature of a specific bequest to him of the debt, not to be paid unless there are insufficient assets to pay the debts. *Ib.* A specific bequest takes preference of legacies, and, as such, the bequest of the debt will be preferred. *Ib.* Whenever from the whole will, it appears that the testator did not intend to discharge the debt by making his debtor executor, the latter is a trustee to the amount of the debt for the legatee or next of kin. *Ib.* But making a judgment debtor executor with others, and in the will bequeathing all payments that may be in the hands of his executors to others, does not show such intention. *Ib.* The debt, when assets for legatees, &c., would be considered money, in the hands of the debtor executor. *Ib.*

1889.

Loomis

v.

Spencer

*LOOMIS AND HAYDEN v. SPENCER AND ROLPH.

Courts never enforce executory contracts against infants or lunatics, except such contracts are for necessities furnished.

But where an infant or lunatic has received the benefit of property sold to him in good faith, by a party who had no knowledge of his incapacity to contract, and where no advantage has been taken of his situation, a court of equity will not interfere to set aside the contract.

Where the creditor of a lunatic on the sale of property to the latter in good faith has obtained a legal security, the court of chancery will not deprive him of such security without restoring to him so much as the estate of the lunatic has actually benefited by the sale.

The bill in this cause was filed in 1818, by Hayden, as the committee of Loomis who had been found a lunatic, to set aside a judgment in favor of Spencer against Loomis and J. O. Rolph, entered upon a bond and warrant of attorney alleged to have been executed while Loomis was of unsound mind. The cause was heard before Chancellor Sanford, and he awarded an issue to try the question of lunacy. The issue was tried before Judge Betts, in 1825, and the jury found that Loomis was a lunatic at the time the bond and warrant of attorney were given, and at the time the debt was contracted which formed the consideration thereof. The cause was then heard before the late Chancellor Jones, who decreed a perpetual injunction against proceeding on the judgment or upon the execution issued thereon, so far as the same related to Loomis. A rehearing having been granted, the cause was again heard before the present chancellor. April 6th.

A. Van Vechten, for complainant. The bill in this cause was filed for a perpetual injunction against the judgment and execution, so far as the same relates to Loomis, upon the ground that he was a lunatic at the time the

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goods were contracted for, and that he so continued until the giving of the bond and warrant, and the entering up of judgment thereon.

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It is a settled elementary principle both of law and equity, that a lunatic is incapable, per se, of making a valid contract, because he lacks that intelligence and discretion which *are necessary to give validity to a contract. He is therefore not held legally responsible for his acts. (*Addison v. Mascall*, 2 Vern. 678. Robert's case, 3 Atk. 312. 2 Mad. Ch. 593.)

The case of *Niel v. Morley*, (9 Ves. jun. 478,) upon which the defendant's counsel relies to sustain the defence, and which seems to favor his purpose, is, I apprehend, at war with long established principles, and distinguishable from the present case. That was a bill inter alia for the repayment of money paid on account by the lunatic. The sale was at auction during several successive days. The lunatic was present the whole time, and made the purchases himself. There had been no issue between the parties to have the fact of his lunacy at the time he made the purchases ascertained by a jury. And the master of the rolls seems to have yielded to his apprehensions of extensive and almost illimitably mischievous consequences which might result from sustaining the complainant's bill.

In this case Loomis was only present at the first and smallest purchase at a private store. The purchase was made by alleged copartners, on account of an alleged or contemplated copartnership between the lunatic and others. The bond and warrant to confess judgment were executed more than a year afterwards; and the fact of lunacy has been conclusively settled by the verdict of the jury, on the feigned issue between the parties, which finds that he was a lunatic not only at the time of the several purchases, but when the bond and warrant were executed. Here there were some persons concerned in the purchase, who participated in the benefits thereof, and who were bound by the contract. Had Spencer sued Loomis upon

the original contract, lunacy would have been a good defence to the suit on his part. But by obtaining a bond and warrant of attorney from him more than a year afterwards, and while in a state of lunacy, a judgment has been entered up against him and the same co-obligor, without an opportunity for defence. Thus circumstanced, a court of equity is called upon to afford him relief; and according to the doctrine of the master of the rolls, in *Niel v. Morley*, this court (whose peculiar province it is to guard the rights of lunatics) must shut the door against him and turn *him back to a court of law. Can this be sound equity? How will it comport with the opinion of Chancellor Sandford, when he awarded a feigned issue to ascertain by the verdict of a jury the fact of Loomis' lunacy! Why was this, if this court cannot grant the relief prayed for? Again, how will it comport with the opinion of Chancellor Jones, who, upon the fact of lunacy being ascertained by the verdict of the jury, decreed relief?

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Had an application been made to the supreme court in due time after the judgment, upon proper proof of Loomis' lunacy, that court would have assumed and exercised equitable powers by awarding a feigned issue to try the question of lunacy; and upon Loomis being found a lunatic, according to the opinion of the master of the rolls, the supreme court must have set aside the judgment and declared the bond and warrant of attorney void. Laches cannot be imputed to Loomis (he being a lunatic) for not making the application and be deemed a ground for denying him relief here.

The doctrine is not sound that equity will not interpose to arrest the enforcement of a contract, void by reason of lunacy. And it is not equity that a lunatic should be bound by a contract, which both law and equity declare him incapable of making.

The insolvency of Rolph can have no bearing upon the case. For a contract void as respects Loomis, by reason of his lunacy, cannot become valid in consequence of the

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subsequent insolvency of any of the other parties; nor can the invalidity of the original bargain be obviated by a bond and warrant of attorney of the lunatic, given more than a year afterwards (while his lunacy continued) in consideration of that bargain; because the fact of lunacy, and the legal consequences flowing from it, are equally decisive against the bond and warrant as against the original bargain.

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The invalidity of a lunatic's contract depends upon the fact of his lunacy when it was made. This fact remains the same whether the opposite contracting party had notice of it or not. The ignorance of the latter of the lunacy will exempt him from the imputation of fraud, but does not remove *the legal incapacity of the lunatic to make a valid contract. Hence it would seem to follow, that want of notice in such a case cannot give efficacy to an invalid contract.

H. Bleecker, for defendant. It is contended on the part of the defendant that this court ought not to interfere to relieve the property of the complainant Justin Loomis from the judgment and execution mentioned in the pleadings in this cause. The defendant was entirely innocent and ignorant of the alleged incapacity of Loomis when the goods were sold to him and when the security was taken.

If Loomis had paid the money for the goods, it is clear this court would not have interfered. On the same principle it ought not to interfere against the security taken for the price of the goods. For the principles which govern the court in such cases, see 2 Mad. Ch. 594, and *Niel v. Morley*, 9 Ves. jun. 478. The doctrine is, that a court of equity will not interfere to set aside a contract overreached by an inquisition in lunacy, if fair and without notice, especially when the parties cannot be reinstated.

The principles on which the court act in such cases are so fully stated and illustrated by Sir William Grant, as

master of the rolls, in the above mentioned case, that nothing more can be necessary than to refer to his opinion.

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The court cannot in this case reinstate the defendant. Its interference is matter of discretion. It will not interfere against equity and conscience, but leave the party to his remedy at law. That Loomis had the goods in partnership and in conjunction with others, we suppose can make no difference in regard to the equity of the defendant. He has lost the goods. Suppose Loomis alone had paid all the money for them; each partner is liable for the whole partnership debt. It is no answer to say that Loomis was not capable of entering into a partnership. The defendant had no notice of his incapacity, and may have trusted, and probably did trust to the responsibility of Loomis. His partners may have believed him to be of sound mind.

The principles on which the court refuses to interfere, are as applicable to the case of a purchase in conjunction with *others, as to the case of purchase by one alone. The loss to the defendant is the same in both cases.

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The answer responding to the bill alleges that the bond and warrant of attorney were given for a debt due from Loomis and Social Rolph to the defendant and his partners. As to the evidence of partnership, see *Whitney & Bancroft v. Sterling*, 14 John. R. 215.

Social Rolph was a competent witness; no objection appears to have been made to him.

If the whole debt should be paid out of Loomis' estate, Social Rolph will be liable to contribution. If he is unable to pay, he has no interest. The defendant, by entering up judgment against Loomis and Jacob O. Rolph, discharged Social from the demand.

It seems that Social did not execute the warrant of attorney, and that he executed the bond after the judgment was entered up. But if the fact of a purchase in conjunction with others can make a difference, then at all events the estate of Loomis should be liable for so much of

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 Spencer. the goods as he actually received; and if the pleadings and proofs do not sufficiently show this, the court will direct the proper means to ascertain it. It is, however, respectfully contended that the fact of a purchase in connection with others leaves the innocent defendant in this cause in the same situation as if the sale had been to Loomis alone.

To show that lunacy is not a defence even in a suit at law, for the price of goods sold, when the vendor is ignorant of the lunacy, I cite *Baxter and another v. The Earl of Portsmouth*, (5 Barn. & Cress. 170, 11 Serg. & Low. 190;) and the same parties, (2 Car. & Paine, 178, 12 Serg. & Low. 79.)

[*158] THE CHANCELLOR. It is evident from the pleadings and proofs in this case, and from the finding of the jury, that at the time when the alleged partnership between Loomis and the Rolphs was formed and the goods purchased, and at the time the bond and warrant were given, Loomis was a lunatic, or person of unsound mind. It also appears equally certain that Spencer had no knowledge or suspicion of that fact. *A judgment being entered on the bond and warrant, the complainants have no defence at law except by an application to the equitable powers of the court where the judgment was entered. They have elected to file their bill here, and the question is whether the defendant Spencer is entitled to retain the legal advantage he has obtained.

There is no doubt of the propriety of courts refusing to enforce executory contracts entered into by a lunatic or an infant, and probably no recovery could be had in either case in a court of law.[1] The courts proceed upon the

[1] See Waterman's Am. Ch. Dig., Tit. Infant. An infant cannot bind himself by his own assent, or even by the consent of a guardian, unless his acts are deemed by a court of chancery beneficial to the infant. *Rogers v. Cruger*, 7 Johns. Rep. 557. A minor is not bound by a purchase which is disadvantageous to him; though he may hold a beneficial one. *Radford v. Ex'r. of Westcott*, 1 Desau. 596. Where land is devised to be sold, and the proceeds paid to an infant, the infant has an election to take

ground that neither has legal capacity to contract. Although a contract of purchase made by either, except for necessities, could not be enforced, yet a court of equity

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the land or money; and if his guardian sells the land, and the sale does not appear to be advantageous to the infant, a court of equity can elect for him, and bind him by such election. *Turner v. Street*, 2 Randolph, 404. A feme sole infant, above the age of sixteen, is entitled, under the law of Maryland, to receive her estate so as to exonerate the executor or administrator of her ancestor. But a settlement made by an agent of such infant is not binding on her. *Pottenger's ex'r. v. Steward*, 4 Paige, 347. Equity will compel the performance of a contract by an infant, when made by his guardian, and to save an estate otherwise in danger of being lost. *Roberts v. Wilson*, 2 Bibb, 597. A contract made with a guardian and not performed during the minority of the ward, and objected to by the ward when of full age, will not be enforced. *Ib.* Infant complainants are bound by the decree, and shall not have time after full age to show cause against it. *Williamson v. Johnson*, 4 Monroe, 255. Where chancery directs infants to convey in performance of an agreement entered into by the ancestor in his life-time, who had stipulated to give a deed with full covenants, the infants will not be required to enter into personal covenants, but only to release and convey all the title whereof their ancestors died seized. *Matter of Ellison*, 5 Johns. Ch. Rep. 281. An account taken before a master, upon the application of the executrix, when no suit is pending, is not binding on infant heirs; but if the father and guardian of the infants attended on their behalf, the account will be opened only to correct errors to be pointed out by them. *Evertson v. Tappen*, 5 Johns. Ch. Rep. 511. Infants' estates are not generally to be sold, either under the act of 1814 or 1815, upon the expectation of an increased income, but only for some special cause. *Matter of Mason*, Hopkins, 122. Thus a petition for sale of an improved farm was denied, though granted as to an unproductive village lot. *Ib.* Whether wild lands exposed to waste of timber will not be ordered to be sold? *Quere.* *Ib.* An agreement having been made for the quieting of mutual claims to real property, between persons who on one side were adults, and some of whom on the other side were infants; and that agreement being executed by the former party, and the execution of it being refused on the part of the infants, who, however, availed themselves of the agreement at law: held, that the infants should be put to their election, either to confirm the agreement, or to relinquish all claim under it. *Overbach v. Heermance*, Hopkins, 337. Where the court declared a deed void, and perpetually enjoined the record of the deed from being ever used as evidence of title, the decree was declared binding on some of the defendants, who were infants, unless they should, within six months after they respectively attained the age of twenty-one years, upon being served with process for that purpose, show cause to the

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0. _____ ought not to interfere where the infant or lunatic has actually had the benefit of the property, if the contract was made in good faith, without knowledge of the contrary.

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Bushnell v. Harford, 4 Johns. Ch. Rep. 302. In a decree against infants, they should be allowed a certain day after they come of age, to show cause against it, and the decree should then, if shown to be improper, put the parties as near as possible in statu quo. *Pope v. Lemaster*, 5 Litt. 77. An infant is not even bound by his contracts for necessities, if his guardian, who could have supplied him, was at hand. *Edwards v. Higgins*, 2 McCord's Ch. Rep. 16. A relinquishment of dower by an infant feme covert, before a clerk, does not divest the right of dower, and such right may be asserted when of full age, and discovered. *Jones v. Todd*, 2 J. J. Marsh. 361. Infancy is a personal privilege, and unless claimed by the party, cannot be urged by another, unless he is privy in estate. *Beeler v. Bullitt*, 3 A. K. Marsh. 281. The court is the guardian of infants, and will not suffer them to be prejudiced by their acts in their minority, especially with the executors of the estate. *Stock v. Stock*, 1 Desau. 192. A bond and mortgage, given by a person under age, declared void, and a perpetual injunction granted. *Colcock v. Ferguson*, 3 Desau. 482. Where a wife, who is an infant, unites with her husband in a deed of conveyance of his real estate to trustees, for the payment of his debts, under an ignorance of her legal rights, being informed, at the time she signed and acknowledged the deed, that the same would not prejudice her rights, such deed cannot be set up against her as a bar to her right of dower in the land conveyed. *Sandford v. McLean*, 3 Paige, 117. A conveyance by an infant feme covert, although executed and acknowledged in the manner prescribed by the statute, is void. *Ib.* After marriage, an infant feme cannot bind herself by any deed or contract, either in law or equity, except under the sanction of the court of chancery, and is provided for by statute. *Ib.* An infant is only liable for necessities he has no other means of obtaining them, except by the pledge of the care of a parent or guardian, who has the means, and is furnish what is actually necessary, he cannot, without the consent of parent or guardian, make a binding contract for articles, other circumstances, would be deemed necessities. *Ib.* When the deals with an infant, he is bound, at his peril, to inquire into the real circumstances of the infant, and whether he is in a position to run, it runs over all means acts, such as himself by a contract for necessities. *Ib.* When the once begins to run, it runs over all means acts, such as himself by a contract for necessities. *Ib.* *Fitzhugh v. Hudson*, 6 Munf. 352. *Fitzhugh v. Hudson*, 6 Munf. 352. Where an infant became a surety on an injunction was granted to him, even against an ass.

Allen v. Minor, 2 Call, 70.

pacity, and where no advantage has been taken of the
 situation of the party. In *Niel v. Morley*, (9 Ves. 477,) Sir William Grant refused to interfere where the lunatic
 had purchased property at auction, and paid part of the
 purchase money and given a warrant to confess judgment
 for the residue; the sale having been made in good faith,
 without knowledge of the lunacy, and it being impossible
 to restore the parties to their former situation. In *Bax-
 ter and another v. The Earl of Portsmouth*, cited by the
 defendant's counsel, (5 Barn. Cres. 170, and 2 Car. &
 Payn, 178,) but much more fully reported by their cotem-
 porary reporters, (7 Dow. & Ry. 614,) the court of king's
 bench permitted the plaintiffs, who were coachmakers, to
 recover against a lunatic for the use of a coach and a
 landau and harness. The carriages were made to the de-
 fendant's order; were suitable to his rank and condition in
 life, and had been hired to him at a fixed sum per an-
 num; the plaintiffs keeping them in repair for his use.
 In that case Bailey, J. says, "There is here no suggestion
 that the plaintiffs have not bona fide given the defendant
 credit. Exhibiting about him no appearance of mental
 incapacity, he goes to the plaintiffs' house and orders car-
 riages, which are afterwards used by him. They are suit-
 able to his condition and degree in life, and such as would
 have been supplied by *other persons if not by the plain-
 tiffs. Under these circumstances I think law and justice
 require that the plaintiffs should be allowed to maintain
 an action against the lunatic." If such are the principles
 of a court of law in regard to lunatics, certainly a court
 of equity should not deprive a creditor of a legal advan-
 tage, which he has obtained, without restoring to him
 whatever benefit the estate of the lunatic has received in
 consequence of the contract. I doubt however in this
 case, whether Loomis ever received any benefit from the
 goods sold. He being a lunatic, the alleged partnership
 between him and the Rolphs was absolutely void. And I
 think it is pretty evident the proceeds of the goods went

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1890. into their hands; though Social Rolph testifies that a part of the goods were taken to the house of Loomis and retailed out by him.

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This witness was probably interested in throwing part of the debt on to the estate of Loomis, to discharge himself from liability on the bond. If Spencer is willing to risk the expense of a reference for the purpose of ascertaining whether Loomis has been benefited by the sale of these goods to him and the Rolphs, the decree must be modified so far as to permit the amount of such benefit only, when ascertained by a master, to be collected out of the estate of Loomis on the execution. Otherwise the former decree must be affirmed without costs to either party.

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When amendments are made to a bill, if the complainant files or serves an entire new bill, incorporating therein as well the original matter as the amendments, he must distinctly designate the amendments in the new bill.

Where a solicitor unnecessarily makes a re-engrossment or a full copy of the original matter, he will not be entitled to an allowance for the same in the taxation of his costs.

If the amendments are not noted upon the new bill, the defendant's solicitor may refuse to receive the copy of the bill which includes such amendments.

It is improper to incorporate in an answer to an amended bill the whole matter of the former answer.

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*The defendant's solicitor should either decline receiving the amended bill where the amendments are not noted upon it, or he should ascertain what the amendments are and answer the amendments only.

But if this course is not pursued by the defendant, the complainant can only avail himself of the objection by excepting to the answer for its pertinence.

The titles of further answers must correspond with the order under which they are put in.

Where exceptions to a former answer and to amendments to the bill are answered together, if neither the exceptions nor the amendments are fully answered, the complainant may file new exceptions founded on the new matters introduced into the bill by way of amendment.

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If the new exceptions are not submitted to by the defendant within the eight days allowed for that purpose, the answers should by an order be referred upon the new exceptions, and upon such of the old exceptions as are not sufficiently answered.

Where the new exceptions are submitted to, the answer must be referred upon the old exceptions which are not sufficiently answered, within ten days after the answer is put in.

New exceptions for insufficiency cannot be taken to the further answer, founded upon the matter of the original bill only.

Where the reference is upon the new exceptions alone, the master cannot inquire whether the old exceptions were fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant.

If the new exceptions clearly relate to the original bill and not to the amendments thereto, the defendant may move to take them from the files, for irregularity; or if he has doubts on the subject, he may urge the objection before the master on the reference.

Where the reference on such exceptions has been proceeded in, if they do not relate to the amendments, the exceptions will be permitted to remain on the files; but the master's report allowing the new exceptions will be overruled.

EXCEPTIONS were filed to the separate answers of the several defendants in this cause for insufficiency; which exceptions, on reference, were allowed by the master. The complainants then obtained an order for leave to amend their bill, and that the defendants answer the amendments and exceptions together. The amendments to the original bill on file were made in the usual manner: by attaching the amendments to the bill, making slight alterations therein in red ink, and by making references thereon in the same manner, showing where the amendments attached were to come in or be inserted. But a copy of the whole original bill, with the amendments incorporated therein, was served upon the defendants' solicitor, without designating what parts thereof were the amendments. The defendants then put in further answers, which not only answered the amendments and

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1830. exceptions, but also contained a repetition of the whole
 The Benning- matter embraced in the former answers. These new an-
 ton Iron Co. swers were entitled the separate answers of the defendant
 v. to the amended bill of complainant, and were endorsed
 Campbell. "Copy answer to amended bill." The complainants filed
 new exceptions, entitled, "Exceptions taken to the an-
 swers of the defendants to the amended bill," and entered
 an order referring it to a master to look into the amended
 bill and the answers, and the exceptions to those answers
 and to report whether the answers were sufficient in the
 points excepted to or not. These exceptions did not relate
 to any matter introduced into the bill by the amendments.
 And upon this ground the defendants gave notice of an
 application to set aside the order of reference and all pro-
 ceedings on the exceptions, for irregularity. Before this
 motion was made, the parties proceeded on the reference
 but without prejudice to the right of the defendants to
 bring on the motion. The master having reported that
 the answers were insufficient, the defendants excepted to
 his report. The original motion and the exceptions to
 the report of the master came on to be heard at the
 same time.

B. F. Butler, for the complainants.

F. B. Cutting, for the defendant.

THE CHANCELLOR. There have been some irregularities
 on both sides, in this case, which it may be proper to
 notice in order to do justice between the parties. The
 manner in which amendments are to be made is stated
 by chancellor Kent in *Luce v. Graham*, (4 John. Ch.
 Rep. 172.) If a party thinks proper to file or serve an
 entire new bill, incorporating the original matter with
 the amendments, he must distinctly mark and designate
 the amendments, so that the defendant and the court may
 see what they are. And where a solicitor unnecessarily

makes a re-engrossment or a full copy of the original matter, he will not be allowed for the same on taxation of costs. In this case the defendants' solicitor might have refused to receive the copy of the amended bill on which the amendments were not noted.

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ton Iron Co.
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The last answer was both irregular and impertinent. The impertinence consisted in a repetition of the whole matter of the former answers. The defendants should have declined receiving the amended bill in its imperfect state, or have ascertained what the amendments were, and answered accordingly. But as the complainants did not except to it on that ground, they cannot now make that objection. The answers were irregular because the entitling thereof did not correspond with the order under which those answers were put in. They are entitled as answers to the amended bill only; but they should have been entitled as further answers to the original bill of complaint and answers to the amended bill. (*De Tastet v. Lopez*, 1 Simon's Rep. 11.) As these answers were however in fact answers to the original exceptions as well as to the amendments, the order to answer has been substantially complied with, and it is now too late for the complainants to make the objection.

Where exceptions to a former answer and amendments to the bill are answered together, if neither the amendments nor exceptions are fully answered, the complainant is only at liberty to file new exceptions founded on the new matters introduced into the bill by such amendments. The answers will then be referred on the new exceptions, and upon such of the old exceptions as are specified in the order of reference, agreeably to the 52d rule. In such cases the complainant must wait until the new exceptions are filed, and then refer both together in the same order if the new exceptions are not submitted to within the eight days allowed for that purpose. Where the new exceptions are submitted to, the answer must be referred

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ton Iron Co.

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New exceptions for insufficiency cannot be taken to the further answer, founded upon the matter of the original bill only. And where the reference is on the new exceptions alone, the master is not at liberty to inquire whether the old exceptions are fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant thereto. (*Partridge v. Haycraft*, 11 Ves. 570. *Williams v. Davies*, 1 Sim. & Stu. 426.) The new exceptions in this case were properly entitled as exceptions to the answer to the amended bill. Under the order referring them, the master had no right to look into the answer, except so far as it was an answer to the amendments; and if he found it sufficient in that respect, it was his duty to overrule the exceptions. (*Irving v. Viana*, 1 M'Clel. & Young, 563.) This was done in *Overy v. Leighton*, (2 Sim. & Stu. Rep. 234,) where the exception to the answer to an amended bill might, on the same principle, have been taken to the first answer. The exception, if taken originally, would have been sustained; but the master overruled it as an exception to the second answer. On appeal from the decision of the master, the vice chancellor sustained his report.

If the exceptions clearly and manifestly do not relate to the amendments, but to the original bill only, I think the defendant may move to take them off the files for irregularity. And where there is any doubt on the subject he may urge that objection before the master on the reference. Here it is evident that these exceptions do not relate to the amendments, and are not covered by the old exceptions. If the reference had not been proceeded in, they should be taken off the files. As the result will be the same, they may now remain; but the exceptions to the master's report must be allowed.

The exceptions and amendments being fully answered,

the merits of the case are with the defendants. They are therefore entitled to the costs of the reference, and of the hearing on the exceptions to the master's report. But as there have been some irregularities on both sides in matters of form, I shall give neither party any costs on the application to vacate the order of reference.

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v.

Buloid.

*WHITE v. BULOID AND OTHERS.

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BULOID AND WIFE v. WHITE.

In no case is the complainant in the original suit compelled to stay proceedings therein, upon the filing of a cross bill, except by a special order of the court.

If the complainant in the cross bill wishes to stay proceedings in the original suit, the cross bill should be filed on oath, and a certificate of counsel should be obtained, stating that he believes a stay of proceedings in the original suit to be necessary for the attainment of justice in the cause, and that the cross bill is not intended for delay.

Notice of the application for an order to stay the proceedings in the original cause should be given to the adverse party.

It is not a matter of course to stay the proceedings in the original suit in any case, unless the defendant in the cross bill is in contempt for not answering.

If the cross bill is not filed before or at the time of answering in the original suit, the delay must be accounted for, or the proceedings will not be stayed.

It is not too late to file a cross bill after the proofs in the original suit are closed, if the complainant in the cross bill is willing to go to a hearing on bill and answer as to the cross suit.

If a cross bill is taken as confessed, it may be used as evidence against the complainant in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer.

After both causes are at issue, or in a situation to be heard, the complainant in the cross suit may have an order that they be heard together.

But the delay of the complainant in the cross suit will not be permitted to delay the hearing of the original cause.

On appeal from an interlocutory order of a vice chancellor, the question of affirming or reversing his decision must depend upon the facts which were before him at the time the decision was made.

1830. THESE causes came before the chancellor upon an appeal
 White from an order made by the late equity court of the first
 v.
 Buloid. circuit, on the 31st of December, 1829. The second suit
 April 6th. was upon a cross bill filed by the defendants in the first
 suit. The defendants in the first suit, who are the com-
 plainants in the last, applied to postpone the hearing in
 the original cause, and to stay the taking of the testimony
 in open court before the circuit judge, until the complain-
 ant therein had answered the cross bill. The facts in the
 case are sufficiently stated in the opinion of the chan-
 cellor.

Fessenden and Ketchum, for the appellants.

William Silliman, for the respondent.

[*165] *THE CHANCELLOR. The practice in relation to cross
 bills does not appear to be well settled, either in this state
 or in the English courts of chancery. It may therefore
 be necessary to look into the origin of the practice, and
 notice the changes it has undergone, for the purpose of
 applying its principles to the present practice of the court
 under the new mode of taking proofs openly, or in open
 court before the circuit judges, as was done in the late
 equity courts. The bill and cross bill were derived from
 the civil law, and they answer to the *conventio* and *re-*
 conventio in the Roman tribunal. If the *reconventio*
 came in before the *litis contestatio*, or joining of the issue
 in the suit, it was in time, and both causes went on *pari*
 passu. The same probatory term was assigned to both,
 and the same time was given for publication. It is from
 this we find in the old books of practice that the cross bill
 should be filed before or at the time of answering the
 original bill, which generally answered to the *litis con-*
 testatio of the Roman law. If it did not come in before
 that time, the causes could not proceed together, as the
 original cause was then gone from the *prætorian forum* to

the judices. (2 Bro. C. & A. L. 348. How. Eq. Side, 287.) Where the reconventio or cross bill came in after the litis contestatio or joining of issue, it did not stop the complainant in the examination of his witnesses, unless the defendant in the reconventio was in contempt for not answering. If it came in, even after publication, it was not too late, but the party must go to a hearing on the testimony taken in the original suit, and on the answer of the defendant in the cross suit; because, after publication passed, no witnesses could be examined to the same matter as to which proofs had already been taken and published. (Cur. Canc. 337. Gilb. For. Rom. 47. *Ward v. Eyles*, Mosel. 382.) The English practice at the present day appears to be to grant an order of course to stay publication until a fortnight after the answer to the cross bill has come in, where the cross bill has been filed in time, that is, before the issue has been joined in the original cause. (Hinde, 54. 1 Atk. Rep. 21.) But where the cross bill is not filed until the original cause has been proceeded in, the motion to enlarge publication must be special, and upon notice to *the adverse party, that the court may judge of it on the circumstances. (*Aylett v. Easy*, 2 Ves. sen. 336.) In no case is the complainant in the original suit compelled to stay proceeding therein without a special order for that purpose. (*Noel v. King*, 2 Mad. R. 392.) After both causes are at issue, or in a situation to be heard, the complainant in the cross suit may, on motion, have an order that both causes be heard together; a copy of which is to be served on the solicitor for the complainant in the original cause. But notwithstanding this order, the delay of the complainant in the cross suit will not be permitted to delay the hearing of the original cause. (How. Eq. side, 289.) The practice on this subject in the Irish court of chancery is undoubtedly more conducive to the ends of justice, and is best adapted to our system of taking testimony orally. There the cross bill must be filed on oath, and the certificate of

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counsel that it is not intended for delay, and that it is necessary for the attainment of justice in the cause. And the proceedings in the original cause are not to be delayed in any case, unless upon the special order of the court, founded upon notice of the application to the complainant therein.

In the case now before me, although some witnesses had been examined, the bill was not filed too late, as the proofs in the cause had not been closed. Neither would it have been too late after all the testimony had been taken, if the complainant in the cross suit had elected to go to hearing on the answer of the defendant therein. She could not complain that there was danger of perjury in her answer, although she had heard all the testimony in the cause. But the hearing of the original cause ought not to be delayed in this case, unless there are merits in the application, and a sufficient excuse is given for the delay. I do not think it a matter of course in any case in this court to stay the proceedings in the original suit, except it may be where the defendant in the cross suit is in contempt for not answering. It will be necessary therefore to look into the merits of the cross suit, and to examine the reasonableness of the excuse for the delay.

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The original bill was filed in the equity court of the first circuit by Lydia White, the step mother of Mrs. Buloid, and the *executrix of her father, claiming the proceeds of certain real estate which had been paid into that court. She claimed it on the ground that she was a creditor of her late husband under an ante-nuptial agreement to a large amount. She has no claim to the proceeds of the real estate unless the personal property is insufficient to meet her demand. Hence the litigation in the original suit necessarily embraces the settlement of the whole of the estate which came into her hands as executrix. Mrs. Buloid, as one of the devisees under the will, is entitled to a full discovery in relation to that estate as well as to many other matters set up in the answer and charged in

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the cross bill. From the very nature of the transactions out of which the claim of Mrs. White arises, it will be impossible for the appellants to go into the examination of witnesses understandingly, without the answer of the respondent.

There has been considerable delay in filing the cross bill, but some part of it may be justly attributed to the irregularity of the respondent's proceedings. The original bill was filed in December, 1827, and the appellants put in their answer in February, 1828. By the 16th rule of the equity courts, the replication should have been filed within thirty days thereafter. It was not filed until about 20 months afterwards. After the expiration of the thirty days the cause was in readiness for hearing on bill and answer; and the complainant had no right to file a replication without the special leave of the court, and upon such terms as might have been reasonably imposed. If the replication had not been filed, in October, 1829, the cross bill probably would not have been necessary. Although the irregularity in filing the replication at that time has been waived by the subsequent proceedings on the part of the appellants, their cross bill was filed very soon after the complainant again moved in the cause. The affidavit of the solicitor and counsel satisfactorily accounts for the delay. If Mrs. White's health is such that she cannot understand her rights sufficiently to put in an answer, other persons should not be permitted to proceed in the original suit in her name until she is so far restored as to answer the cross bill. The circuit judge has acted on the supposition, that the examination of some of the complainant's witnesses before an examiner, was sufficient to preclude the filing of a cross bill. But if the order for that examination was made *ex parte* and without notice, as stated by the counsel on the argument, even that was irregular. For under the 42d rule of the equity courts, the defendant's solicitor was entitled to notice of

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the motion and a copy of the petition upon which it was founded.

The decision of the late equity court of the first circuit must therefore be reversed with costs; and the time for taking the proofs in the original cause must be extended till forty days after the defendant in the cross suit has put in and perfected her answer to the cross bill. And then both causes must be heard together, if the appellants are ready to bring their cross suit to a hearing without any further delay to the proceedings in the original suit. The cause must be remitted to the vice chancellor of the first circuit, that the further proceedings therein and in the cross suit may be had before him.

The new affidavits which have been presented by the respondent's solicitor, *ex parte*, since the hearing of this cause, cannot affect the question as to the affirmance or reversal of the decision of the equity court. If the facts then before the court entitled the appellant to a stay of proceedings, the decision was erroneous and must be reversed. The rule to answer the cross bill in thirty days or that it be taken as confessed, could not vary the appellant's rights. The bill taken as confessed would have been equally available to them, in the original suit, as an answer to the cross bill admitting the facts therein charged. And it might have been read at the hearing, to sustain the allegations in the answer to the original bill. If the respondent wished to introduce any new facts to vary the order which this court might otherwise make on the appeal, he should have served copies of his affidavits on the opposite party, to enable them to answer the same. The order must therefore be entered as above directed but with leave to the defendant to apply to the chancellor to alter or modify the same upon the affidavits now presented, and upon due notice to the adverse party. Copies of the affidavits to be served with such notice.[1]

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[1] See Waterman's Am. Ch. Dig. vol. i. tit. CROSS BILL. A cross bill is a defence, and the matters upon which it is founded must be stated in the

no case is the complainant in the original suit compelled to stay proceedings therein, upon filing of a cross bill, except by a special order of the court. *White v. Buloid*, 2 Paige, 164. If the complainant in the cross bill wishes to stay proceedings in the original suit, the cross bill should be filed on oath, and a certificate of counsel should be obtained, stating that he believes a stay of proceedings in the original suit to be necessary for the attainment of justice in the cause, and that the cross bill is not intended for delay. *Ib.* It is not a matter of course to stay the proceedings in the original suit in any case, unless the defendant in the cross bill is in contempt for not answering. *Ib.* If the cross bill is not filed before or at the time of answering in the original suit, the delay must be accounted for, or the proceedings will not be stayed. *Ib.* It is not too late to file a cross bill after the proofs in the original suit are closed, if the complainant in the cross bill is willing to go to a hearing on bill and answer as to cross suit. *Ib.* If a cross bill is taken as confessed, it may be used as evidence against the complainant in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer. *Ib.* Where the surviving complainants are insolvent, the defendant, who had demands against the deceased and surviving complainants jointly, will be permitted to file a cross bill, in the nature of an original bill against the surviving complainants and the personal representatives of the deceased complainant; and the proceedings in the original suit will be stayed until original suit, as well as in the cross bill. *Draper v. Gordon*, 4 Sandf. Ch. Rep. 210. A defendant cannot by a cross bill have the benefit of a defence to the original suit which was known to him when he answered, and which might have been, but was not stated in his answer. *Ib.* Where the cross suit fails as a defence, it cannot be permitted, indirectly, to effect a defence, by treating it as an original suit, and proceeding to a hearing and decree thereupon. *Ib.* The principle that every defence which might have been set up in a suit, whether actually made or not, is cut off by a judgment or decree, applies to a defence first made by a cross bill which might have been set up in the answer. *Ib.* Where the point in issue in both suits is the same, no testimony has been taken in the original suit, and the cross bill was filed in time, the depositions taken in the cross suit may be read in both causes when they are heard together. *Ib.* A cross bill is a matter of defence. It cannot introduce new and distinct matter not embraced in the original suit, and if it does so, no decree can be founded on those matters. *Galatin v. Erwin*, Hopkins, 48. 8 Cowen, 361, S. C. The plaintiff in a cross bill cannot contradict the assertions in his answer in the original suit. *Hudson v. Hudson*, 3 Randolph, 117. In the cross suit is in readiness for a hearing. *Brown v. Story*, 2 Paige, 594. A cross bill must be filed before publication is passed in the original cause, unless the plaintiff in the cross bill will go to a hearing on the proofs already published. *Field v. Schieffelin*, 7 Johns. Ch. Rep. 252. *Gouverneur v. Elmendorf*, 4 Johns. Ch. Rep. 327. A cross bill is generally considered

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and used as a matter of defence; the first cause and the cross bill are but one cause. *Ib.* Chancery will, sometimes at the hearing, and in its discretion, direct a cross bill, when it is necessary to bring before the court the rights of all the parties, and the matters necessary to a just determination. *Ib.* After the cause on the original bill was set for hearing, the defendant was informed that the plaintiff was a nominal one, and that the real plaintiff was a citizen of the same state with the defendant. He immediately filed a cross bill, charging this and asking a discovery. The original suit ought not to be heard until the cross bill is answered. *Young v. Potts*, 4 Walsh. C. C. 521. A cross bill can be sustained only on matters growing out of the original bill. *Daniel et al. v. Morrison's ex'rs*, 6 Dana, 182. One defendant cannot have a decree against a co-defendant without a cross bill with proper prayer and process, or answer as in an original suit. *Tulbot v. M'Gee*, 4 Monroe, 379. Though cross bills usually are decided at the same time that original bills are, it is not indispensable that they should be. *Coleman v. Moore*, 3 Litt. 355. The object of a suit of foreclosure is, to obtain satisfaction from the lands; and it is inconsistent with the nature of such mortgage security to allow a set-off. And where such counter claims exist and are liquidated, the course of proceedings in equity requires that they should be presented by way of cross bill. *Troup v. Haight*, Hopkins, 289. It seems, a cross bill is always necessary where the defendant is entitled to some positive relief beyond what the scope of the complainant's suit will afford him. *Pattison v. Hull*, 9 Cow. 747. Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established without a cross bill filed by the defendant. *Carnochan v. Christie*, 11 Wheat. 446. A defendant in chancery may rely upon matters purely legal, connected with the matters of the bill, for his defence; and, by his cross bill, require the complainant to answer thereto. *Hume v. Long*, 6 Monroe, 119. The act of 1809-10, empowering the defendant in chancery to state interrogatories in his answer, and make it answer as a cross bill, gives him all the rights that a complainant in a cross bill has, according to the English practice. *Wilson v. Bodley*, 2 Litt. 55. When, and upon what terms a cross bill will be allowed. *Brown v. Beal*, 4 Hayw. 287. A cross bill must be confined to the subject matter of the bill. *May v. Armstrong*, 3 J. J. Marsh. 262. Where the allegations of a cross bill are inconsistent with the admissions of the answer, they cannot be taken as true though unanswered. *Savage v. Carter*, 9 Dana, 414.

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LUPIN AND OTHERS v. MARIE AND VARET.

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Marie.

Where L. on the 24th August, 1826, sold to M. who was then in good credit, and supposed himself solvent, a quantity of goods, for which M. was to give his own note without security, payable in six, seven, eight, nine and ten months; and the goods were delivered to M. and shipped by him for the West Indies on the 26th of August, 1826, and on the 4th of September thereafter, and before he had executed the notes, M. stopped payment; and on the 9th of the same month M. assigned the goods to V. to secure him for a large sum of money, for which he was responsible as endorser for M.; and on the 5th September L. applied to M. for a re-delivery of the goods, and also afterwards, in the same month, claimed the goods from V., and both M. and V. refused to re-deliver the goods to L., and M. and V. denied all fraud in the transaction, and V. denied all knowledge at the time of his purchase, of the conditions of the sale by L. to M. and also of the non-payment for the goods on the part of M.; it was held that the sale and delivery of the goods to M. was unconditional and valid, and was sufficient in law to change the property; that the assignment by M. to V. was also valid, and that L. had no lien on the goods for the purchase money due him from M.

The principle of stoppage in transitu does not apply to such a case; that right must be exercised, or an attempt made to exercise it, before the goods reach the possession of the vendee.

If goods, upon a sale thereof, are unconditionally delivered by the vendor to the vendee without any fraud on the part of the latter, the vendor can only look to the personal security of the vendee for the payment of the purchase money; he has no equitable lien for the same on the goods.

If the delivery of the goods is procured by the fraud of the vendee, the title will not pass to him, and the vendor can reclaim the goods if they have not passed into the hands of a bona fide purchaser.

A purchaser, however, from such fraudulent vendee, to secure antecedent debts or responsibilities, cannot hold the goods as against the vendor.

So, if the delivery of the goods was conditional, the title does not pass until the condition is performed.

But a bona fide purchaser without notice of the fraud will be protected, even in the case of a conditional delivery.

Where a merchant in good credit who knows himself to be insolvent, fraudulently conceals that fact from the vendor, and purchases goods without intending to pay for them or for the purpose of assigning them to his confidential creditors, such sale may be set aside as fraudulent.

*In a case of great hardship, where the complainants had reason to suppose that the conduct of the defendants was fraudulent until they put in their answer, which fully explained the circumstances of the case, the court dismissed the bill without costs.

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The defendant J. B. Marie was a shipping merchant and importer of goods, residing in the city of New York; and the complainants were merchants living in Paris, who

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carried on business in the city of New-York by an agent. Marie had for two or three years been in the habit of purchasing goods from his agent upon credit, and with giving security. On the morning of the 24th of August 1890, the agent of the complainants called at the office Marie, and sold to him 18 packages of goods, amounting to about 57,000 francs, for which sum the latter agreed to give his own notes, without security, payable in six, seven, eight, nine and ten months. At the time of the sale Marie informed the agent that he intended to ship the merchandise to the West Indies. The goods were immediately delivered to Marie, and were by him shipped to the West Indies on the 25th or 26th day of August. At the time of the sale Marie was in good credit; but on the 4th of September thereafter, and before he had executed his notes for the goods, he failed. On the ninth of the same month he assigned to the defendant Varet, four several shipments of goods which had been made on the 1st of April, the 1st of June, and on the 9th and 26th of August previous. And in such assignment was included the merchandise purchased from the complainants. This assignment was made for the purpose of securing to Varet the payment of about sixty thousand dollars, for which he had become responsible, as the endorser for Marie, and as his surety upon custom house bonds, &c. On the 19th of September, after Marie stopped payment, the agent of the complainants applied to him for a redelivery of the goods, and for an order for the goods upon the captain of the vessel in which they had been shipped. But Marie refused to redeliver the goods, and declined giving the order requested by the agent. On the 19th of September the brig in which the goods were shipped put into Norfolk to repair. While the brig was in that port, Varet was informed by the agent that the complainants claimed the redelivery of the goods; but Varet also refused to make such redelivery, and directed his agent at Norfolk to ship them to himself at New-York. Varet, upon the

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arrival in New-York, sold the goods, and the net proceeds were about \$7000. The complainants filed their bill in this cause, insisting upon their right to either a redelivery of the goods, or to the payment of the original consideration agreed to be paid for them; upon the ground that the purchase by Marie was fraudulent, and that the notes for the consideration money were not executed previous to the failure of Marie. The defendants denied all fraud in the transaction; and Marie alleged that he had always been ready to execute the notes, but had never been requested to do it. Varet in his answer denied that at the time of the assignment to him he knew or suspected the conditions of the sale to Marie had not been complied with by him, or that the merchandise had not been paid for. And he insisted upon the validity of his title under the assignment from Marie; and that the sale and delivery of the goods to Marie was valid and sufficient in law to change the property. The cause was heard on bill and answer.

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C. Graham and J. Talmadge, for complainants.

Charles Baldwin, for the defendants.

THE CHANCELLOR. The principle of stoppage in transitu is wholly inapplicable to this case. Goods cannot be stopped or reclaimed unless the right is exercised, or there is a bona fide attempt made to exercise it before the property actually comes into the possession of the vendee. In this case the goods had come into the possession of the vendee, and had been shipped by him to the West Indies, and were on their way thither before his failure.

The vendor of real estate has, in many cases, an implied lien on the property sold, for the purchase money, where no express lien or other security is agreed upon by the parties. But there is no such lien on personal property, even as between vendor and vendee. If the goods

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are absolutely and unconditionally delivered, without fraud on the part of *the vendee, the vendor can only rely to his personal security for payment. (*Chapman v. Athrop*, 6 Cowen's Rep. 110; 1 Greenl. Rep. 376.) If delivery of the goods is obtained by the fraud of the vendee the title does not pass, and the vendor may reclaim the goods if they have not passed into the hands of a bona fide purchaser. In such a case the assignee to whom the goods have been assigned to secure antecedent debts and responsibilities, cannot hold them as against the seller. So also if the delivery was not intended by the parties to be absolute, but conditional, the vendor does not part with his property until the condition is complied with (4 Mass. Rep. 405. 6 John. Ch. Rep. 437. 4 Mass. Rep. 289. 1 Paige, 312.) But even in that case a bona fide purchaser who has no notice of the fraud will be protected. For where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the injury must sustain the loss.

It is not necessary in this case to decide whether it would be sufficient to avoid a sale as fraudulent if a merchant in good credit purchase goods upon his own responsibility, who knows himself to be insolvent at the time but conceals that fact from the vendor. If he made such purchase under such circumstances, intending never to pay for them, or for the purpose of placing them in the hands of an assignee for the benefit of other creditors there can be no doubt it would be such a fraud as would avoid the sale. But in this case it is evident that no fraud was intended. The goods were purchased on the 24th August and shipped on the 26th. At that time Maresca had no reason to suppose he was insolvent, although he was so in fact. From his answer, which has not been replied to and therefore must be taken as true, it appears he then supposed himself solvent, and actually paid \$18,000 of his debts after the sale. Between that time and the day he stopped payment, several vessels arrived from abroad.

bringing him intelligence of the failure of the house of Goldschmidt & Co. with which he had great commercial dealings, and of other heavy losses sustained in his commercial speculations elsewhere. These accumulated disasters compelled him to suspend his payments on the fourth of September.

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*I also think the delivery was not conditional and that it was not intended to be so by either party. The purchase was made at the solicitation of the complainant's agent and upon the personal responsibility of Marie alone. No security was required, nor was it supposed necessary. The agent knew the goods were to be immediately shipped for the Havana, and they were sent on board the brig for that purpose. Although notes were to be given for the purchase money, the liability of Marie would not have been changed by the giving of such notes. The agent no doubt took it for granted they would be given whenever called for. There was therefore no good reason why the delivery should be conditional, and I cannot believe either party so intended it. In *Smith v. Dennie*, (6 Pickering's Rep. 262,) where goods were sold to be paid for in an endorsed note on delivery, and the goods were the next day delivered by a clerk in the absence of the vendor and without anything being said as to the condition, and the vendor neglected, for eight days, to call for the note, after which the goods were attached by another creditor, the condition was considered as waived.

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It may undoubtedly be considered a very hard case that the goods of the complainants, sold so short a time before the failure, and which at the time of the failure remained in the original packages and under the control of the vendee, should, to the entire exclusion of the complainants, go into the hands of Varet to secure antecedent debts and responsibilities. But such is the settled law of the land; and it is not in the power of this court to change it. The bill in this case must be dismissed; but as the complainants had grounds to suspect fraud or collusion until the

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In the matter of the failure, I shall not charge them with costs.
of Petit

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*IN THE MATTER OF E. PETIT, A LUNATIC.

A committee must be appointed in this state for a non-resident lunatic enable him to obtain the control of property here.

And a commission may issue to ascertain the lunacy of a non-resident; it cannot be executed beyond the limits of this state.

Commissioners may be required to give the lunatic due notice of the time and place of executing a commission of lunacy, although the lunatic sides out of the state.

April 6th. In this case the alleged lunatic was a resident of Wilt in the county of Fairfield and state of Connecticut. petition was presented by her brother-in-law, setting forth that she was about thirty years of age, and was of unsound mind; that she was entitled to an undivided share of certain real property in this state, and also to twenty shares of the capital stock of The Newburgh and Cohec Turnpike Company. The petitioner prayed that a commission of lunacy might be issued; and his counsel asked that the same be directed to certain persons in the county of Fairfield as commissioners.

J. W. Knevels, for the petitioner.

THE CHANCELLOR. It was settled in the case of *M. v. M.* (2 John. Ch. Rep. 124,) that a committee must be appointed by this court for a non-resident lunatic, to enable him to obtain the control of property in this state and that a commission might issue for that purpose. As the commissioners cannot authorize the empannellment of a jury beyond the jurisdiction of this court, the commission cannot be executed out of the state. (Southern case, 2 Ves. sen. 402.) The usual order directing the

commission to be executed at or near the residence of the lunatic must be dispensed with in such a case ; and it may be executed in such county as will be most convenient. In this case the residence of the lunatic is near the line of this state ; the commission must therefore be executed in the adjoining county, which is most convenient and nearest to her residence. The *commissioner must also give her due notice of the time and place of executing the commission, that she may attend if she thinks proper to do so.

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SEWALL v. R. M. & I. RUSSELL.

Where R. R. & I. R., partners, confessed a judgment to W. their brother-in-law for \$25,000, under which the household furniture of R. R. together with other property was sold, and W. at the sale purchased the furniture and left it with R. R. ; and it appeared that the judgment was given to W. to secure a debt due him of \$2850, and to apply the residue of the said judgment when collected in paying such of the creditors of R. R. & I. R. as R. R. should designate ; and the property of the firm which could not be reached by execution was assigned by R. R. to I. R. in trust to pay himself the costs of executing the trust, the expenses of obtaining R. R.'s insolvent's discharge, and the expenses of all suits at law or in equity, and to apply the residue in payment of the debts of the firm in the order prescribed in a schedule annexed ; S. a creditor of R. R. & I. R. prosecuted his debt to judgment against them, and issued an execution thereon which was returned unsatisfied ; it was held that the judgment to W. was given to defraud creditors, and that the assignment from R. R. to I. R. was also fraudulent and void as against the creditors of R. R. & I. R., and that S. was entitled to receive out of the property so assigned the amount of his judgment, with interest and his costs of suit.

The defendants were merchants in New-York, and failed. They then confessed a judgment to W. S. Smith, their brother-in-law, for \$25,000, under which judgment the furniture of R. M. Russell with other property was sold. The furniture was bid in by Smith and left in the possession of R. M. Russell. By the answer of the defendants it appeared that this judgment was given to se-

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[*176] cure a debt of \$2850 to Smith, and to enable him to collect the residue of such judgment and to apply the money in payment of such of the creditors of the firm as R. M. Russell should thereafter designate. The property of the firm which could not be reached by an execution was assigned by R. M. Russell to Israel Russell, his copartner, in trust in the first place to pay Israel Russell the costs and expenses of executing his trust, the expenses of procuring R. M. Russell's discharge under the insolvent act, and the expenses of prosecuting and defending all suits in law or *in equity, and to apply the residue to the payment of the debts of the firm, in the order prescribed in a schedule annexed to the assignment. The complainant having proceeded to judgment and execution at law for a debt due to him by the firm of R. M. & I. Russell, and the execution having been returned unsatisfied, he filed his bill in this cause against the said R. M. and I. Russell to obtain satisfaction of his judgment out of their joint and separate property, which had been placed beyond the reach of an execution at law. The cause was heard on bill and answer.

R. Sedgwick, for the complainant.

S. A. Foot, for the defendants.

THE CHANCELLOR. The objection that as R. M. Russell had assigned all his interest in the property and effects of the firm to his copartner, he ought not to be a party defendant, cannot be sustained. The complainant's judgment at law being against him, as well as against Israel, he was a proper party to a suit seeking satisfaction of that judgment, although the property might all be in the hands of his co-defendant. It is evident from the answer that the judgment to Smith was given to defraud creditors; as there could be no good reason for giving a judgment bond conditioned to pay \$25,000 when the debt intended to be secured was less than \$3000. The object

must have been to cover property to a much larger amount, and to keep it under the control of the defendants, or of their brother-in-law. As Smith is not a party no decree can be made affecting his rights to the property bid in by him under that judgment. The assignment from one partner to the other of the partnership property to secure the payment of the partnership debts, was a palpable attempt on their part to keep the property under their own control, and it cannot succeed. Unless there was a surplus beyond the debts of the firm, the assignor had no interest in the partnership effects which could pass by the assignment so as to give any greater interest to the assignee than he before possessed. The only effect of the assignment was to exclude the assignor from any control over the property; and *it is even doubtful whether it could have that effect here. I think also the assignment must be considered fraudulent, as against the creditors of the firm, in consequence of the trust to pay the assignor's expenses in obtaining the benefit of the insolvent act, and the costs of defending suits which might be brought by the creditors for the recovery of their debts.

There must be a decree declaring the assignment fraudulent and void, as against the complainant and other creditors of the firm. It must also be referred to a master in the city of New-York to appoint a receiver of the property and effects of the company, and of the defendants individually; and to collect and apply the same to the satisfaction of the complainant's judgment. And the defendants must assign and deliver over on oath to the receiver all the property and effects of the firm, and of each of them individually, and all books of account and choses in action relating thereto, as the master shall direct. The receiver is also to be directed to pay out of the proceeds thereof the complainant's costs in this suit to be taxed, and the amount of his judgment with interest. The proceeds of the property and effects of the firm to be first applied for that purpose.

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COZINE v. GRAHAM AND BLEECKER.

In a suit for a specific performance of a contract in relation to land, if the bill states that an agreement was made, on demurrer to the bill the contract will be presumed to have been reduced to writing and signed by the parties, or their agents, unless the contrary appears.

If the objection that the contract was not in writing does not appear upon the face of the bill, the defendant must either plead that fact in bar, or insist upon it by way of defence in his answer.

Where the defendant in his answer admits the agreement, and does not afterwards insist upon the statute of frauds as a bar, he cannot make that objection; and no proof of the agreement will be necessary.

If the agreement appears in the bill to be a parol agreement, and no facts are alleged to take the case out of the statute, the defendant may demur to the bill.

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*A plea will be overruled if it does not set forth any new matter, although the objection raised by it would have been valid if it had been urged by way of demurrer to the bill.

April 20th.

THE complainant was the owner of about 16 acres of land in the city of New-York. He employed the defendant Bleecker to sell the same at auction. The land was sold by the acre. By the terms of the sale, ten per cent was to be paid immediately, ten per cent. upon the delivery of the deed, and the residue, with interest, was to be secured by bond and a mortgage upon the premises. The defendant Graham became the purchaser, and paid to the auctioneer ten per cent. towards the purchase money. It being ascertained that one of the avenues of the city covered a small part of the premises, it was agreed between the parties that such part should be deducted; and Graham agreed to pay for the residue agreeable to the terms of sale. Graham afterwards refused to carry the contract into effect, and the auctioneer declined paying over the money to the complainant without his consent. The bill prayed for a specific performance of the contract, and that the auctioneer might be decreed to pay over the sum of \$1000 which he had received towards the purchase money, and for general relief. Graham demurred to the

whole bill upon the ground that it was not distinctly alleged therein that the contract for the purchase was in writing, and signed by the defendant or by his legally authorized agents.

1830.
Coxine
v.
Graham.

P. A. Cowdry, for the complainant.

W. T. M'Court, for the defendant Graham.

THE CHANCELLOR. The objection raised by the demurrer in this case is as to a matter of form and not of substance. A contract for the sale of lands is alleged to have been made between the parties, of which the complainant claims a specific performance; but it does not distinctly appear by the bill whether it was or was not reduced to writing and signed in such a manner as is required by the statute of frauds. The estate was sold at auction, and if the *auctioneer did his duty by entering on the conditions of sale the name of the purchaser and the amount of his bid in the usual manner, it was a valid agreement, within the statute which was in force at the time this sale was made. It was so held by this court in *McComb v. Wright*, (4 John. Ch. R. 659;) and such is now the settled law in England. The defendant's counsel contends, that the complainant must distinctly allege in his bill that the contract was reduced to writing, and was signed by the defendant or his agent legally authorized; and that if he does not, the omission may be taken advantage of by demurrer. On the other side it is insisted that the defendant cannot demur, unless it appears upon the face of the bill that the contract was not in writing; but that in such case he must either plead the statute or answer the bill. This question has been much discussed in the English court of chancery, and many conflicting opinions have been entertained on the subject there. The first case which I have been able to find is *Ash v. Abdy*, (3 Swanst. 664,) which arose in 1678, soon after the pass-

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1880. *Cozine v. Graham.* ing of the statute. A bill was filed for the specific performance of a parol agreement made previous to the passing of the act. The defendant, supposing the statute to be retrospective in its operation, demurred to the bill. Lord Nottingham thought otherwise, and overruled the demurrer. No question appears to have been raised as to the propriety of bringing the subject before the court by demurrer; and from the report of the case I presume the facts all appeared on the face of the bill. The case of *Child v. Godolphin*, (1 Dick. 39, 2 Bro. Ch. C. 566,) came before Lord Macclesfield, 1723, on a plea, which was overruled and was ordered to stand for an answer. In the case he is reported to have said, that if the bill had stated the agreement generally, a demurrer might have been allowed; but that if the agreement was stated to be in writing, the plea must be supported by an answer denying any agreement. The practice appears, however, to have been otherwise, at least for the next fifty years. *Howard v. Okeover*, before Lord Bathurst in 1778, (Swanst. 421, n.) a demurrer was put into a bill for a specific performance. The solicitor general, who argued the case for the defendant, admitted that a defence, by way of demurrer, to a bill of that kind was new, and that the statute of frauds was usually insisted on by way of plea. He contended, however, that it appeared by the bill that neither the defendant nor any person authorized by him had signed any agreement in writing; and that in such a case, what would be good by way of plea, might also be urged on demurrer. The court overruled the demurrer on other grounds; and that question was therefore left undecided. In *Whitbread v. Brockhurst*, (1 Bro. Ch. C. 404,) which came before the court six years after, a plea of the statute was overruled for duplicity. And Lord Thurlow intimated an opinion that the defendant might have demurred. The only agreement set up in that case, was alleged in the bill to be in writing, and part performance was also stated. Probably the intimation was right.

in that case, as all the objections appeared on the face of the bill. If the written agreement, set out in the bill, and the alleged acts of part performance, did not take the case out of the statute, there was nothing new to be brought before the court by a plea. In such a case a demurrer appears to be a proper mode of defence. *Whitchurch v. Bevis*, (2 Bro. C. C. 559,) came before Lord Thurlow two years afterwards on a plea, and he then again expressed the same opinion. The plea was overruled and ordered to stand for an answer. But in 1789, he reversed that decision, on a rehearing, and the plea was allowed. This last decision seems to be inconsistent with the idea that a demurrer was the proper mode of taking advantage of the statute in that case. For the proper office of a plea is to bring forward fresh matter not apparent on the face of the bill, and which, if true, is a bar to the complainant's action. And a plea which sets forth nothing except what appears on the face of the bill, is bad, and must be disallowed, although the defendant might have availed himself of the objection by demurrer. (*Billing v. Flight*, 1 Mad. R. 230. *Cowen v. Price*, 1 Bi. R. 175.) In *Redding v. Wilkes*, in 1791, (3 Bro. C. C. 400,) Lord Thurlow allowed a demurrer to a bill for a specific performance, although the objection was made that the defence should have been by plea. In that case, however, I think it is evident *from the report, that the promise stated in the bill was not in writing. The question does not appear to be yet settled in England; for as late as 1824, where the bill stated an agreement in writing, but did not allege that it was signed by the defendant, or by any one authorized by him, a demurrer to the bill was overruled. The counsel for the complainants in that case insisted that it was not necessary to allege in the bill that it was signed, or even that it was reduced to writing. The vice chancellor said if it was not signed it would not be an agreement, and he would therefore presume it was signed, until the contrary was shown.

1830.

 Cozine
v.
Graham.

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1899.
Cosine
v.
Graham.

The rule of pleading on this subject is well settled in the courts of law, and I do not see why the principle of that rule is not equally applicable to this court. It is there held that the statute did not alter the form of pleading; that if an agreement or contract is stated in the declaration to have been made, it is not necessary to allege that it was in writing, as that will be presumed until the contrary appears. If the agreement is denied, the plaintiff must produce legal evidence of its existence, which can only be done by producing a written agreement duly executed according to the provisions of the statute. If the agreement is admitted by the pleadings, no evidence to prove its existence is necessary, and the court never inquires whether it was or was not in writing. Even there I presume the defendant might demur, if it distinctly appeared by the declaration that the agreement or promise was one which was not only legally binding on him. There was formerly some difficulty on this subject in chancery, on account of the idea which prevailed that the court was bound to carry into effect a parol agreement admitted by the answer, although the defendant at the same time insisted that it was not legally binding, as being within the statute. It now appears to be well settled that the defendant may admit the existence of the parol agreement, but insist upon the statute in his answer as a bar to any relief founded thereon, unless there has been such a part performance as to take the case out of the operation of the statute. (Willes on Pleading, 562, note.) If the agreement, as stated in the bill, appears to be a parol agreement only, and no sufficient grounds are alleged to take the case out of the statute, the defendant may by demurrer object to any relief founded thereon. But if it is stated generally that an agreement or contract was made, the court will presume it was a legal contract until the contrary appears; and the defendant must either plead the fact that it was not in writing, or insist upon that defence in his answer. He may then require the

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production of legal evidence to prove the existence of the contract. If he admits the agreement in his answer, and does not insist upon the statute, no evidence of the agreement will be necessary, and the decree will be made upon that admission. (*Talbot v. Bowen*, 1 Marsh. Kent. R. 437.)

1830.
Dumond
v.
Shafts.

This view of the case being conclusive against the demurrer, it is not necessary to examine the other question raised on the argument. The demurrer must be overruled with costs; and the defendant Graham must pay those costs and answer the complainant's bill within twenty days after service of notice of the order overruling the demurrer, or the bill may be taken as confessed as against him.

DUMOND v. SHAFTS.

Where D. agreed with S. to exchange farms with him, and S. agreed to pay D. at the rate of \$37.50 per acre for the difference in quantity between the farms, and D. and S. also at the same time entered into an agreement by which they bound themselves to correct any error which should subsequently be discovered as to the number of acres contained in either of the farms upon a survey thereof, provided the correction was made by the first day of April then next ensuing; and D. afterwards, but after the first day of April, caused the two farms to be surveyed, and ascertained that there had been an error as to the quantity in the farm sold to S. by D., S. having paid for a less number of acres than that farm contained, and S. refused to correct the mistake; it was held that the time mentioned in the agreement was not of the essence of the contract, and S. was decreed to pay the difference between the estimate and the actual number of acres, according to the agreement, together with the costs of the suit.

Where there is a conveyance of a farm, and a turnpike road passes across the farm, and the road is not excepted from the conveyance, the purchaser has no remedy in chancery for a compensation for the land covered by the road; his remedy, if any, is at law upon the covenant of warranty.

The laying out of a public highway across a man's land does not divest the title of the owner, but the title remains in him, subject to the public right of way over the same; and whenever the road ceases, the land will revert to the original owner, or to his assignees.

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1830.
 Dumond
 v.
 Sharts.
 April 20th.

IN January, 1818, Dumond agreed with Sharts to exchange his farm in Hillsdale, supposed to contain 217 acres, for the farm of the latter, lying in Chatham, which was estimated at 150 acres. Sharts agreed to pay the complainant at the rate of \$37.50 per acre for the difference in quantity between the two farms. Conveyances were accordingly executed, and the defendant paid the difference between 150 and 217 acres, at the rate agreed upon by the parties. Another writing was also executed by them at the same time, by which it was agreed that if upon a subsequent survey of the farms any error should be discovered as to the number of acres, that such error should be corrected, provided the correction was made on or before the first of April then next. Dumond afterwards caused both farms to be surveyed; when it was found that the Hillsdale farm contained more than two hundred and seventeen acres, and the Chatham farm less than one hundred and fifty acres. But the surveys not having been made previous to the first of April, 1818, Sharts refused to correct the mistake. In 1823, Dumond filed his bill to obtain payment for the difference between the estimated quantity of land in the respective farms and the actual quantity as ascertained by the surveys. The late chancellor decided that the time mentioned in the written agreement was not of the essence of the contract; and that the defendant must pay the difference between the estimated and actual number of acres, according to his agreement with the complainant, together with the interest thereon from the commencement of this suit. And he directed a reference to ascertain the quantity of land in each farm, and reserved the question of costs and all further directions until the coming in of the report. By the report of the master, it appeared that the excess in the Hillsdale farm was six acres, and that the deficiency in the Chatham farm would be two acres and a half and seventeen perches, if the *land covered by the Chatham turnpike road was con-

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sidered a part of the farm ; but if not, then the deficiency in that farm would be about six and a half acres.

1820.
Dumond
v.
Sharts.

A. Vanderpoel, for the complainant.

A. L. Jordan, for the defendant.

THE CHANCELLOR. The only questions before me at this time are as to the land covered by the road, and as to costs. It appears that the road formerly laid out for The Chatham Turnpike Company runs partly through the farm and partly on one side thereof. And I infer from the evidence in the cause and from the master's report, that the land covered by the road is included in the general boundaries of the farm as described in the deed to Dumond; and that it is not excepted out of the conveyance. If such is the fact, Dumond has no right to compensation in this suit on account of the land covered by the road. If there is a covenant of seisin in the deed, perhaps he may recover thereon in a court of law. But no such claim is made in the complainant's bill, and no sufficient foundation therefor is contained in any of the pleadings. Neither is there any evidence before the court to enable me to ascertain whether the fee of the land over which this road passes is now in the complainant or in the state. In general, the laying out of a public highway over a man's land does not divest the title; which still remains in him subject to the public right of way over the land. In such cases, whenever the road is taken up or altered, the owner is restored to the full enjoyment of the land which is no longer wanted for the public use. But by the act of April, 1804, lands purchased by The Chatham Turnpike Company for the use of their road, or condemned for the same purpose and paid for by the company, became absolutely vested in the corporation. And under the act of 1820, the title to such lands is now vested in the people, and cannot revert to the original owners thereof or their assigns,

1830. except by a grant from the state. There is in this case, however, no evidence that any land included within the *boundaries of the Chatham farm was either voluntarily conveyed to the company, or condemned for the use of the road and paid for under the act. Beside the agreement as to the number of acres in these farms must be construed with reference to the boundaries thereof as described in the deeds. The covenants have undoubtedly provided the proper remedy for a failure of title, as to any part of the land included within those boundaries. The complainant is therefore, under the decision of the late chancellor, only entitled to recover from the defendant payment for eight acres, two roods and seventeen perches of land, at the rate of \$37.50 per acre, with interest from the 17th of November, 1823.

I think the complainant is in this case entitled to his costs against the defendant. The latter refused to correct the error in the original estimate of the farms, although the claim of Dumond was perfectly just and equitable under the agreement of the parties. Instead of doing so, he insisted upon the technical objection that the day had passed before the survey was made; and by that means compelled the complainant to seek relief in this court. If a party resists an equitable claim under such circumstances because he supposes the laws afford no remedy to the injured person, he must pay the costs of the litigation, if in the end the law is found to be against him.

THE FULTON BANK v. E. S. BEACH AND OTHERS.

On an appeal to the court for the correction of errors, a counsel fee on the motion to file the petition of appeal is not taxable, the order to file the petition being a common order; and the solicitor is only entitled to fifty cents for attending to have the same entered.

The signature of only one counsel is necessary to a petition of appeal or to

the answer to the same, and only one counsel fee is taxable for that service.

1880.

The solicitor is to be allowed for the draft of original matter to be inserted in a case for the court of errors on appeal; and for two written copies of the case including the matter not original.

Fulton Bank
v.
Beach.

No allowance can be taxed for abbreviating the case; for if properly made, it is of itself an abbreviation of the pleadings and proofs, &c.

The points for the court of errors constitute a part of the case; and should be estimated as a part thereof upon the taxation.

*Only one counsel or solicitor's fee is to be allowed for the whole decree or order; and it is improper to tax separate fees for each distinct point or special direction contained therein.

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Where there are several appeals entered at different times in relation to two distinct orders of different characters, the solicitor is entitled to an allowance for all the services necessarily rendered on each appeal until the proceedings upon the appeal are consolidated by the court.

The proceedings on the remittitur to make the decree of the court of errors a decree of the court below, and the enrolment of the decree and the execution for the costs awarded by the appellate court, are a necessary part of the costs on the appeal, and are to be taxed in the same bill with the other costs and annexed to the enrolment of the decree of the court of errors.

In this case the defendants entered two separate appeals April 20th. to the court for the correction of errors, from the orders of this court of the 3rd of March, 1829, refusing permission to re-examine a witness, and of the 4th of August, in the same year, refusing them leave to amend their answer. (1 Paige's Rep. 429.) After the answer to the petition of appeal from the first order was filed, and before the second appeal was made, the complainants made up and printed a case on the first appeal. They afterwards made up and printed a full case on the last appeal, which included a great portion of the matter contained in the first case. Both appeals were argued in the court of errors in September, 1829, and both the orders of the chancellor appealed from were affirmed with costs. But the court of errors deeming that a great part of the second case was needless and unnecessary, made it a part of their decree that no allowance should be made to the respondents on the taxation of costs for any part of the second case which

1830. was contained in the case made upon the first appeal
 Fulton Bank v. Beach. The taxing officer was also prohibited by the decree of the court of errors from allowing any charge on the second appeal for services which were not actually and necessarily performed upon that appeal. That court also consolidated the orders of affirmance, and made only one decree of affirmance as to both appeals. The respondent's solicitor made out upon these appeals separate bills of costs. The one was taxed at \$536.42, and the other at \$208.99. The defendants appealed from the decision of the taxing officer as to many of the items allowed by him upon the taxation. *The nature of the objections to the taxation are stated in the opinion of the chancellor.

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THE CHANCELLOR. One hundred and seventy-five items in these two bills of costs were originally objected to before the taxing officer. He has sustained the objections, either wholly or in part, as to one hundred and forty-five of those items; and has stricken from the bills more than \$1350. About fifty items are still objected to by the defendants; who insist that those items should have been disallowed entirely, or still further reduced by the taxing master.

It will be necessary to examine several of the items claimed in this case, for the purpose of seeing whether they were taxable against the appellants, even if the services were performed. In the bill of costs on the first appeal the following items are objected to as illegal or overcharged: "Counsel fee on motion that appellants file petition of appeal, \$1.25. Solicitor attending, \$1." The appellants insist that nothing should be allowed for the first item, and only 50 cents for the last. In this they are undoubtedly correct. Under the 26th rule of the court for the correction of errors, the order to file the petition of appeal is a common order, and is to be entered by the clerk of course on the written request of the solicitor; and the solicitor is entitled to fifty cents only for

attending the clerk to have the order entered. The clerk was entitled to ten cents for filing the request; but the affidavit was unnecessary under that rule. The third, fourth, fifth, sixth and seventh items are for services not usually performed, and ought not to have been taxed without evidence that they were actually performed. "Drawing statement of the case for counsel, &c. \$2.50. Attending two counsel with the same for advice, \$1.50." These items were found in the fee bill of 1813, but were stricken out of Chancellor Kent's bill in 1818, on the ground that the charges were for services merely fictitious, which were seldom if ever performed. (Assembly Jour. Feb. 25, 1818.) They related only to answers to bills in this court, and were never applicable to an answer to a petition of appeal. The items embraced in the tenth and eleventh objections appear to be legal charges, and the *services must necessarily have been performed. The answer to the petition of appeal must be signed by counsel. The language of the act of 1813 shows that the legislature contemplated the signatures of two counsel to the petition of appeal and to the answer. In the revised statutes the language is altered, and a distinction is made between the petition of appeal, or the answer to the same, and the case for the court; showing that the allowance is to be for one counsel only in the first case, and for two counsel in the last. The twelfth and thirteenth objections relate to services which are usually performed, and, I presume, must have been in this case. The fourteenth relates to the number of written copies of the case for which the solicitor has a right to charge by the folio. The case of the respondents on the first appeal has been swelled to the extent of 644 folios; of which 125 are said to be original matter, and the residue consist of copies in hæc verba of the pleadings, depositions, petitions, affidavits, &c. The master has allowed for a draft and three copies of the original matter, and for three copies of the pleadings and other matters not original to be inserted therein. The

1830.
Fulton Bank
v.
Beach.

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1830. policy of the legislature has been to pay liberally for services actually and necessarily performed, but to discourage the multiplication of copies of papers or other fictitious services, which are never made or performed except for the mere purpose of increasing a bill of costs. In this instance the number of copies is fixed by the fee bill and cannot be increased. The solicitor is entitled to the draft of the original matter to be inserted in the case; to a copy of such draft, together with the matter not originally to be signed by counsel; and to one other copy for the printer. No more written copies are necessary, as the copy signed by the counsel is retained by the solicitor if it is in fact ever made before the case is printed. No allowance can be taxed for abbreviating the case for counsel, for if properly drawn, the case itself is nothing but an abbreviation of the proceedings in the cause. The papers properly constitute a part of the case required by the sixth and twelfth rules of the court for the correction of errors and should be estimated as a part thereof. No separate items for drawing, signing, *copying or serving points are allowed by the fee bill, or required by the practice of the court. Under the fee bill of 1813, the solicitor was allowed for the draft of his brief by the folio, and for a copy thereof for the use of counsel. By the revised statutes, he is allowed but two dollars for the draft and one dollar for the copy. In this case the allowance must be according to the former rate. The solicitor has charged his brief on the first appeal at 250 folios, and on the second at 150. He also claims to be allowed for three copies each. The taxing officer has reduced each brief to 1 folio, and allowed for two copies of both, amounting the whole to \$64. It is still objected by the appellants that the amount allowed by the master is enormous and oppressive. Neither of these briefs have been exhibited to the court to enable me to judge whether the number of folios taxed by the master were proper or necessary. It seems to be a misnomer to call either of them a brief.

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on a motion to amend an answer or to re-examine a witness. I must therefore direct the officer on re-taxation to strike out the allowance for the second copy of each, and to look into them and see whether they ought not still further to be reduced. The twentieth and twenty-first objections relate to the copy of the chancellor's opinion on the last motion, printed for the use of the court on the first appeal. This opinion is contained in the case made on the last appeal, and the respondents are not to be allowed for two copies for the printer, or the expense of printing it twice, as that was unnecessary. These items must be stricken out of the first bill. The master has allowed for "solicitor and counsel attending on motion to affirm decree, \$2.25," and the like sum for attending on motion for judgment for the respondents. These charges are for one and the same service, and both should not have been allowed. The charge for solicitor and counsel attending on motion for remittitur should have been disallowed. No such motion is ever made; it follows of course, on the affirmance or reversal of a decree. The allowance of one dollar to the solicitor for obtaining the remittitur, and attending this court therewith, is all to which he is entitled. I have understood that one of the former taxing officers has been in the habit *of allowing a separate solicitor's and counsel fee as to every distinct point of direction contained in an order or decree of this court, or of the court for the correction of errors; and that a similar allowance has been made for every day's attendance on an order of reference. Both allowances are improper and illegal; and the latter was by a former chancellor made an express ground of complaint to the executive against the conduct of certain masters who continued to tax the same, notwithstanding the decision of the court to the contrary. (Assembly Journal, 28th January, 1812, p. 11.) The items objected to in the bill on the second appeal depend upon the same principles, except as to services since the argument. The appellate court thought

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Fulton Bank
v.
Beach.

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 Fulton Bank
 v.
 Beach.

both appeals should have been argued together, as most of the principles embraced in the arguments were equally applicable to both. Hence they considered the repetition of the same matter in the second case, which was embraced in the first, as a useless expense, and refused to permit it to be taxed. But the questions were not in all respects the same on such appeal, and the taxable fees to counsel never in fact are equal to the amount actually paid. As these were separate appeals, brought at different times, and in relation to orders of a different character, I think the usual costs on each, previous to the decision of the court, should be allowed; deducting however, for such parts of the case and brief as were unnecessarily repeated on the second appeal. No allowance must be made for duplicate proceedings after the argument. The court decided both appeals together, and directed them to be consolidated in the order of affirmance, to save the useless expense of two remittiturs, and of separate orders, enrolments and executions in the court of chancery, to carry into effect their decision. The party should have obtained one remittitur, reciting both appeals, and containing the decision of the court thereon, as consolidated and entered in the minutes of the clerk. The filing the remittitur in this court and the order consequent thereon, and the enrolment of the decree of the court of appeals and the execution for the costs awarded by that court, are a necessary part of the costs of the appeal, and must be incorporated into the same bill and annexed to the enrolment of the decree here.

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*The bills of cost in this case must be redrawn and re-taxed upon the principles above stated, leaving out the objectionable items and those which were before rejected by the taxing officer. The respondent's solicitor is also to be permitted to add to the first bill of costs the additional expense of reciting both appeals in the remittitur, and of the enrolment of the decree to carry into effect the decision of the appellate court. The costs may be re-taxed

by the vice chancellor of the first or of the third circuit on the usual notice.

1890.

Lynde
v.
Budd

LYNDE v. BUDD AND OTHERS.

Where D. in April, 1818, sold land to B. an infant, and the infant upon the execution and delivery of the deed to him gave to D. a bond and mortgage upon the premises for the purchase money; and the deed and mortgage were both duly acknowledged and recorded, and one half of the purchase money was paid to D. by B. at the time of the purchase; and B. the infant immediately went into possession of the premises, and continued in possession until after he arrived at the age of 21 years; and then sold the same to R. who conveyed them again to other persons; and all the purchasers had full knowledge of the mortgage, which was assigned by D. to L. in 1819; it was held, that the mortgage was a legal charge upon the land, and that if the premises did not sell for a sum sufficient to discharge the amount due upon the mortgage, with the costs of the suit, B. would be liable to pay the balance.

The contract with the infant was not void, but only voidable at his election, when he became of age.

He might then have relinquished the property, and claimed a re-payment of the money paid by him to the grantor at the time of the purchase.

But by continuing in possession after 21, and conveying the land with warranty, he affirmed the contract, and made himself liable for the payment of the residue of the purchase money.

The deed and mortgage being executed at the same time formed but one contract; and the infant could not affirm such contract as to the deed and avoid it as to the mortgage.

In April, 1818, J. Dearborn sold and conveyed to the defendant Budd, then being only 20 years of age, a lot of land in Homer, for the consideration of \$600. At the same time Budd executed and delivered to Dearborn a bond and mortgage for the purchase money, one half thereof to be paid immediately, and the residue on the first of June, 1819, with interest. The deed and mortgage were both duly *acknowledged and recorded, and \$300 of the purchase money was, on the day of the acknowledgment, paid to Dearborn by Budd. Budd went

Apr¹ 20th

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1830: immediately into possession of the premises, and continued in possession thereof until after he became twenty-one years of age. Budd afterwards sold and conveyed the land to the defendant Rouse. The other defendants are subsequent purchasers from Rouse. All the defendants purchased with full knowledge of the mortgage, which was assigned to the complainant by the mortgagee in 1819. The only question now raised was, whether Rouse and the purchasers from him took the land discharged from the lien, by reason of the infancy of Budd, at the time the mortgage was executed.

Lynde
v.
Budd:

N. Dayton and J. A. Collier, for the complainant.

Henry Stephens, for the defendants.

THE CHANCELLOR. The contract with the infant in this case was not void, but only voidable, at the election of the grantee when he became of age. He might then have relinquished the property to the grantor, and claimed back the money which had been paid at the time of the purchase. (*Willis v. Twambly*, 13 Mass. R. 204.) But by continuing in possession after he became twenty-one, and finally selling and conveying the land with warranty, he affirmed the contract. If an infant exchange lands, and after he becomes of age continues to occupy the lands taken in exchange, he affirms the bargain and the exchange becomes perfect. (Co. Litt. 51 b. 2 Vern. 225.) In *Kelley's case*, (1 Brownl. R. 120,) where an infant took a lease of land, rendering rent, and continued in possession after he became of age, he was held personally liable on the covenant for the payment of the rent. In this case, the deed and mortgage being given at the same time are to be construed together, as forming only one instrument or contract. (1 Paige's R. 455.) The infant cannot avoid one part and affirm the other. If, when he came of age, he had elected to avoid the bond and mortgage, the deed

1891

Lynde
v.
Budd.

also would have been avoided. By continuing in possession, and conveying the land, he affirmed the whole bargain, and made himself legally liable for the payment of the residue of the *purchase money. The cases of *Hubbard v. Cummings*, (1 Greenl. R. 11,) and *Roberts v. Wiggin*, (1 N. H. R. 73,) are directly in point on this question. The case of *Badger v. Phinney*, (15 Mass. R. 359,) also shows that an infant cannot disaffirm the contract, and at the same time retain the fruits of the bargain which he has made while under age.

The mortgage in this case is therefore a legal charge upon the land; and there must be the usual decree directing a reference to complete the amount due, and for a sale of the premises on the usual notice on the confirmation of the master's report. There must also be a decree over against Budd for the balance, if the premises do not sell for enough to pay the amount reported due, with the costs of this suit.[1]

[1] Whatever may be the rule as to executory contracts, it is clear that the executed contract of an infant is voidable only, and only the infant or his legal representative can avoid it. Ib. The deed of an infant purporting to be founded upon a valuable consideration, is not absolutely void but merely voidable; and to render a subsequent conveyance by an infant after he arrives of age, an act of dissent to the prior deed, it must be so inconsistent therewith that both deeds cannot properly stand together. *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635. Infants may elect at majority to take property purchased by his guardian with his money, or the money and interest. An election deliberately made will be binding upon him. *Coplinger v. Stokes*, Meig's Rep. 175. An infant can only avoid an act done of record, pending infancy; otherwise as to acts in pais. Any act after twenty-one, disavowing or dissenting from a deed delivered during infancy, with equal solemnity with the deed, annuls and avoids the deed. *Breckenridge v. Ormsby*, 1 J. J. Marsh. 252. Where there was a clear proof of a contract and part performance, by the ancestor, specific performance was decreed against an infant heir, who was allowed six months after coming of age to show cause. *Wilkinson v. Wilkinson*, 1 Desau. 201. Although the courts will not allow infants to be bound by acts that are prejudicial to them, yet they will support such as are beneficial. *Radford v. Westcott*, 1 Desau. 596. When it is for the benefit of infants, the court will authorize a change of their property. *Huger v. Hu-*

1830. *ger*, 3 Desau. 18. And sales of estates in which they have an interest.
- Kingsland** *Stapleton v. Langstaff*, 3 Desau. 22. Where it appeared that the parents of infants were unable to maintain them, the court ordered them to be maintained out of their own property. *Cudworth v. Thompson*, admr. of Hall, 8 Desau. 258. Where infants had a large estate, and their mother only a bare competency, the court decreed an allowance out of their estate for their maintenance and education. The mother allowed to have the exclusive direction of the education of her daughter. *Heyward v. Cuthbert*, 4 Desau. 445. An infant is allowed twenty years after he arrives at age to file his bill for redemption of a mortgage. *Lamar v. Jones*, 3 Har. & McHen. 328. A grant adjudged to be cancelled and void on a scire facias, out of chancery, will not divest the property of an infant, who is not a party to the suit in chancery. *Digges v. Beale*, 1 Har. & McHen. 67. An infant cannot retain property purchased by him, and at the same time repudiate the contract of purchase under which he received the property. And where the infant after he becomes of age, repudiates the sale, the title to the property remains in the vendor, as between such vendor and the infant. *Kitchen v. Lee*, 11 Paige, 107. Where the guardian of an infant invests the property of his ward in real estate, in the name of such ward, without authority, or conveys to the ward real estate in payment of a debt due from himself without the sanction of the court of chancery, the infant, upon arriving at the age of twenty-one, has the right to elect to keep the property thus conveyed in lieu of the debt, or may repudiate the conveyance, and claim the money and interest. *Eckford v. DeKay*, 8 Paige. 90. See Waterman's Am. Ch. Digest, tit. INFANT.

KINGSLAND, ASSIGNEE, &C., v. ROBERTS, EXECUTRIX, &C.

Where a bill was filed to settle the accounts of a joint adventure, more than twenty years after the whole subject of the controversy had arisen, and where the justice of the claim had not been admitted during that time, the staleness of the demand was considered a good reason for refusing any relief to the complainant.

April 20th. THE complainant filed his bill in this suit for an account, and the cause was submitted on the pleadings and proofs. The facts in the case sufficiently appear in the opinion of the chancellor.

THE CHANCELLOR. This bill was filed in December, 1825, by the assignee of R. Roberts, an insolvent debtor, to re-

cover from the executrix of M. Jones a balance alleged to be due from the latter, previous to 1805. R. Roberts, M. Jones and R. Simons were owners of the brig Amiable Creole in 1803, each owning one third. The brig was captured in 1804; and being insured, R. Roberts received the insurance money, and, as he alleges, paid the other owners their share of the money, leaving certain debts for supplies furnished the brig unpaid. This settlement was in September, 1804, and the claim in this cause is for Jones' share of what *Roberts says he paid on account of the ship, in the latter part of the same year. R. Roberts was discharged under the insolvent act, in July, 1817, and assigned his property to Kingsland. Jones died in November, 1824, and Simons the May preceding. It is evident, from exhibit No. 4, that the whole subject matter of this controversy arose on and previous to the 12th of January, 1805; nearly twenty-one years before this suit was commenced. Jones lived more than nineteen years after that time, and it is evident from the exhibits produced that he never, during that time, could have admitted the justice of the claim. I am inclined to think that this is a case where an action of assumpsit would have been sustainable, if there was any justice in the claim; and consequently that the statute of limitations would be a good bar. But at all events, the staleness of the demand, and the length of time which has elapsed, are sufficient to induce this court to refuse its aid at this time. The suit is not commenced until all those who could explain the transaction are in their graves; and the original party making the claim is the only witness to substantiate a single item of the account. It also appears that he was the person who applied to the counsel to commence the suit in the name of his assignee. Although the executrix has been fortunate enough to find his receipt in full dated in 1806, about one year after the controversy arose, this witness attempts to explain it away. In this, however, he has not succeeded to the satisfaction

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of the court. The receipt is for two hundred and twenty-five dollars in full of all demands against the brig. Considering all the facts of this case, and the frequent mistakes this witness made in other parts of his examination I am satisfied I should be doing injustice to the heirs of Jones if I trusted to his recollection to explain away this receipt. Although Jones frequently consented to submit the justice of the claim of Roberts to his neighbors, it is not to be inferred from that circumstance that he admitted its correctness. I think the contrary presumption would be the most reasonable. The owners of different interests in a ship are tenants in common and not partners; and each one is liable for his portion of the repairs, &c. If Roberts paid to Simons his share of the insurance money before his part of the debt was settled, it does not follow that Jones was bound to pay the half of his share of those debts if he afterwards became insolvent. If Roberts paid a debt due from himself and his joint owners, he should have called on Simons for his share while he was responsible.

The bill must be dismissed, with costs.

OGDEN AND OTHERS, EXECUTORS, &C. v. SMITH.

Where R. H. appointed by his will three executors and devised to them all his real estate upon several trusts, one of which was, to execute all proper deeds and take the proper measures for fulfilling all contracts entered into by the testator, or by them for the sale of any part of his real estate; and the testator declared in his will, that in case one or more of his executors should die before himself, or should decline to execute the trust, if one so died or declined, the remaining two should nominate another person as their co-executor and trustee; and if two of them should die or decline, then the testator declared that his sons should nominate one person, and his daughters another, and the persons so nominated, if approved by the remaining executor, should become executors and trustees under the will; and if all the executors should die or decline, that then the testator's sons and daughters might choose two persons as afore-

will as executors and trustees, and which two persons might nominate and choose the third; and after the making of the will, the testator made a codicil thereto, and by it appointed two additional executors and trustees of his will, and then republished his said will with the codicil as a part thereof; four of the executors, in February, 1830, proved the will, and one renounced; it was held, that unless a greater number than two declined the trust, it would not be necessary to supply their places in the manner prescribed in the will; and that the four who had qualified, possessed every necessary power to execute all the trusts mentioned in the will.

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v.
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Where a part only of the executors qualify and accept the trust, those who qualify will have full authority without the others to execute a power to convey real estate, which is by the will conferred on the executors named therein.

Executors who do not prove the will, are superseded by the grant of letters testamentary or of administration to others; and they cannot dispose of any part of the estate until they appear and qualify as executors.

RICHARD HARRISON, late of the city of New-York, deceased, being in 1827 seized in fee of a lot of land in the county of Jefferson, contracted to sell the same to the defendant, who immediately entered into possession of the lot, and has continued in possession ever since. In 1825, Mr. Harrison made and published his will, and thereby devised all his estate real and personal to his executors, T. L. Ogden, W. Johnson and B. Robinson, upon the trusts therein mentioned. The first trust expressed in the will was, that the executors and trustees, either personally or by attorney, should execute all proper deeds, and take proper measures for fulfilling all contracts entered into by the testator, or by themselves, for the sale of any part of the testator's real estate. The will, after specifying other trusts, contained the following clause: "And whereas, it may happen that one or more of my executors may die before me, or decline to execute the said trusts I do hereby declare that if only one of them should die, or decline the said trusts, that the remaining two shall and may nominate another person whom they may think fit, to be the third executor and trustee. But if two of my said

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1830. trustees should die, or decline to execute the said tru
 Ogden that then my sons, or a majority of them, shall and n
 v. nominate one person, and my daughters, or a majority
 Smith. them, another, who if approved of by the then execu
 shall become executors and trustees under this my w
 And if all the said before named executors shall die bef
 me, or decline to execute the said trusts, then and in s
 case two other persons may be chosen by my sons a
 daughters respectively, as aforesaid, to be executors a
 trustees under my will; and the said two persons m
 nominate and choose a third to be joined with them in
 execution of the said trusts. And in every case the p
 son or persons to be so nominated and chosen as afores
 shall take, have and possess all the estate, rights and po
 ers, and be subject to all the duties which any of t
 trustees named in this my will would have, or be entitl
 or subject to, as fully and effectually as if they had be
 named as trustee and executor, or trustees and execut
 in and by my said will." In 1827, and after the afores
 contract was made with the defendant, the testator ma
 and published a codicil to his will, and in such codi
 nominated and appointed his friend Clement C. Mo
 and his son William H. Harison executors of the w
 and trustees under it, with all the powers which had *be
 conferred upon his other executors; and he thereby
 published the original with the said codicil annexed. T
 testator died in December, 1829, seized of the land c
 tracted to be sold to the defendant. Four of the execut
 and trustees in February last proved the will; and
 Johnson, the remaining executor and trustee, renoun
 in the manner prescribed by the revised statutes. T
 whole of the purchase money, which the defendant agr
 to pay for the land, became due on the first of Februs
 last. The complainants tendered to the defendant a de
 executed by themselves and all the heirs at law of the t
 tator, containing the usual covenants of warranty as to
 title, and demanded from the defendant payment of

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purchase money. The defendant refused to accept the deed, or to pay the purchase money, upon the ground that no person had been substituted as executor and trustee in the place of W. Johnson, either by the two other executors named in the original will, or by all the executors who had qualified; contending that the deed would not be valid, unless some person was thus substituted as executor and trustee, and joined in the conveyance.

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W. H. Harrison, for the complainants, insisted that by the appointment of the two additional executors, the testator intended to revoke the clause in the original will for supplying vacancies. That he had either altered his mind as to the number of executors and trustees, or had intended to provide against the contingency of vacancies by increasing the number of executors and trustees.

T. W. Ludlow, for the defendant.

THE CHANCELLOR. The true construction of this will and codicil, taken together, appears to be this: By the original will the testator intended that three executors should actually accept the trust; and if any of those named by him declined, provision was made to supply the vacancies. In the codicil two others are added, without any new direction as to supplying vacancies if any of them should renounce the execution of the will. The original intention of the testator will therefore be carried into effect by permitting any number of the executors, not less than three, to qualify and execute the trust. If three or more of them had renounced, the number must have been increased, so as to complete that number in the manner specified in the original will. But as four have qualified, there is no necessity of supplying the place of the fifth, who has renounced the trust. The learned commentator on American law, in the last volume of his valuable treatise which has just been published, supposes

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 Smith.

that the provision authorizing the executors who proved the will to convey without the others has been repealed in the recent revision. (4 Kent's Commentaries, 320.) He very properly declares such an alteration of the will to be injudicious. His opinion is founded upon the construction of the 106th and 112th sections of that title, and the revised statutes which treats of the nature and incidents of estates in real property, and the alienation thereof (1 R. S. 735.) But he has evidently overlooked the fifth section of the subsequent title, relating to the powers and duties of executors, &c. in which the provision of the statute of 21 Hen. 8, ch. 4, is re-enacted, almost in the same words as in the former statutes of this state. (S. 109, § 55.) The 15th and 16th sections of the title relative to the granting of letters testamentary and of administration, (2 R. S. 71,) declare the executors who do not prove the will, and who are not named as such in the letters testamentary or of administration, to be superseded thereby, until they shall appear and qualify; and are prohibited from disposing of any part of the estate. These provisions limit and control the 112th section of the article relative to powers contained in a previous part of the revision. The power in that case is only conferred in the executors who prove the will, and they may join in the execution of the power. In this case the power to execute conveyances, given by the will to the executors, was duly executed by those to whom letters testamentary were granted since the revised statutes went into operation. Their deed conveyed a good and valid title to the purchaser, and he is bound to accept the same and to pay the balance due agreeably to the contract.

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v.
Hoffman.

*BEDELL v. HOFFMAN AND OTHERS.

A bill of interpleader, strictly so called, is where the complainant claims no relief against either of the defendants, but only asks for leave to pay the money or deliver the property to the one to whom it of right belongs, and that he may thereafter be protected from the claims of both.

But a bill in the nature of a bill of interpleader may be filed to redeem and be let into possession of mortgaged premises.

And where from conflicting claims of the defendants the complainant is compelled to resort to such suit, he will be allowed his costs.

On a bill in the nature of a bill of interpleader, costs are not a matter of right, but rest in the discretion of the court.

Bills of interpleader should not be filed except in cases where the complainant can in no other way be protected from an unjust litigation in which he has no interest.

And where a bill of interpleader is unnecessarily filed, the complainant will not be allowed his costs out of the fund.

The complainant gave a mortgage to H. Eckford to secure the payment of \$1800, in fact loaned from The Life and Fire Insurance Company of New-York; but which Eckford negotiated as agent and took the securities in his own name. Six hundred dollars of this debt was paid previous to the failure of that company. At the time of the failure one note of \$1200 remained unpaid, for which the bond and mortgage of the complainant was held as security; and which note, together with the bond and mortgage and certain other demands due to the company, had been assigned to Josiah Barker, in trust and for the benefit of Jacob Barker, to secure the latter for certain alleged claims of his against the company. After the appointment of the receivers of that company, the amount due on the mortgage was claimed by them from the complainant. Jacob Barker also claimed the amount of the mortgage under the assignment to him, and offered if the complainant would pay him the money to give the complainant ample security to indemnify him against the

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1830. claims of the other parties. The complainant dec
 Bedell paying the money to Jacob Barker, and filed his b
 v. the nature of a bill of interpleader in this cause ag
 Hoffman. Eckford, the receivers of the Life and Fire Insu
 [*200] *Company, and the two Barkers; and prayed in said
 that the defendants might interplead and settle the
 between themselves; that the note and bond and mort
 might be delivered up and cancelled upon his paying
 court the amount due thereon; and that the proper p
 might execute a discharge of the bond and mortga
 order to have the same cancelled on record. Ecl
 having no personal interest in the suit, suffered the b
 be taken as confessed against him. The receivers p
 an answer, claiming the debt for the benefit of
 creditors and stockholders of the company gener
 and the Barkers by their answer claimed it as belon
 to Jacob Barker under the assignment.

F. B. Cutting, for the complainant.

M. Hoffman, for the receivers.

D. Selden, for the Barkers.



THE CHANCELLOR. A bill of interpleader strictly
 called is where the complainant claims no relief aga
 either of the defendants, but only asks that he may b
 liberty to pay the money or deliver the property to
 one to whom it of right belongs, and may thereafter
 protected against the claims of both. (*Mitchell v. Ha*
 2 Sim. & Stu. 63.) In such cases, the only decre
 which the complainant is entitled, is a decree that
 bill is properly filed; that he be at liberty to pay
 funds into court and have his costs; and that the def
 ants interplead and settle the matter between themsel
 But a bill in the nature of a bill of interpleader to red
 and to be let into the possession of mortgaged premi

may be filed. And in a case where the complainant had been obliged to resort to such a suit in consequence of the conflicting claims of the defendants, he was allowed his costs, contrary to the usual practice in suits to redeem. (*Goodrich v. Shoebolt*, Preced. in Chan. 333.) Costs in such cases however rest in the discretion of the court, and are not a matter of right; and where the complainant is in full possession of the mortgaged premises, and cannot be *dispossessed by an action at law in favor of either of the parties claiming the mortgage money, the party who has offered to receive the amount due and give an adequate indemnity, ought not to be charged with the complainant's costs, if in the end it appears he was in the right. The filing of bills of interpleader ought not to be encouraged; and they should never be brought except in cases where the complainant can in no other way protect himself from an unjust litigation, in which he has no interest. The defendants in this case were actually litigating their rights at the time this bill was filed. The complainant was in possession, and I do not understand that either party had commenced any proceedings against him. I think, therefore, that he should have awaited the result of the litigation already commenced, or have accepted the indemnity offered by one of the parties, and paid the money to him. The other parties are officers of the court, and ought not to be personally charged with costs, in any event, while they are acting in good faith; neither should the fund in their hands be subjected to the expense of useless litigation. The complainant must be relieved, but without costs.

It was proper to make Eckford a party for the purpose of having the mortgage properly cancelled, as it stood in his name, although in trust for one of the other parties. He had no interest in the suit, and did right in not making any unnecessary expense. No other decree can be entered against him, than to have satisfaction of the mortgage acknowledged by him, under the direction of

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the court. The mortgage must be discharged, and the bond and note given up and cancelled; and the money in court must remain to abide the final decision of the cause between the other defendants. It is perhaps unnecessary to have any further proceedings between the defendants in this cause for the present, as their rights are in the course of litigation in another suit. The question of costs and all other questions and directions, between them, must be reserved; with liberty to either to apply hereafter for an issue or a reference to set those questions, if necessary, as they shall be advised.

[1] Proceedings at law, being confined to the immediate parties, it frequently happens that justice cannot be administered, at law, between who are actually concerned, without a circuitry of action. Courts of chancery remedy this inconvenience, and the evils that must otherwise result from it, by bills of interpleader. When a person owes a debt, from peculiar circumstances, is unable to decide to whom he ought to pay it, chancery will compel the parties to interplead. The complainant files a bill of interpleader, seeking an injunction against several parties, one of whom is attempting to coerce payment to himself, of the same debt. He should bring the money into court, or at least give bond and security for its ultimate payment, according to the decree. *Briggs v. Kouns*, 7 D. 411. A bill of interpleader lies only where two or more persons claim the same debt or duty from the complainant, by different or separate interests. *Hayes' executrix v. Johnson*, 4 Ala. Rep. 267. [Vide Cooper's Equity, Story's Eq. Pl. 237.] A bill of interpleader may be filed, although the claim of one of the claimants is actionable at law, and that of the other in equity. *Lozier's ex'rs v. Van Saun's adm'rs*, 2 Green's Ch. Rep. 325. It seems that a bill of interpleader will be sustained in cases where it is absolutely necessary that the complainant should resort to equity for protection. *Ib.* It is no cause of demurrer to a bill of interpleader filed by executors, that the bill prays relief, on the ground that the estate is liable to prove insolvent. *Ib.* The fact that the particular amount due is ascertained, does not take from the executors the character of indistinct stakeholders. *Ib.* Nor is it a cause of demurrer to a bill of interpleader that it is filed after judgment at law, no defence having been made against the recovery of judgment, where the whole or a part of the debt is equitable only. *Ib.* By delaying to file his bill until after judgment, the complainant subjects himself to the burthen of bringing the money into court, but is not deprived of his right. *Ib.* The bill of interpleader is not a proper remedy when the complainant has any personal interest in the question to be settled. *Ib.* A simple bill of interpleader cannot

sustained by a party who has in any way lent himself to further the claims of either of the parties who claim the fund in controversy, or to aid one in obtaining the possession thereof to the exclusion of the other. *Merrin v. Ellwood and Titus*, 11 Paige, 365. A person in possession of a fund, who stands in the same relation, in respect to the fund, to each of the parties claiming it, may receive an indemnity which is tendered to him by either, and may pay over the funds to the person giving such indemnity. *Ib.* But upon doing so, his right to file a bill of interpleader is determined. *Ib.* A simultaneous offer by the possessor of the fund, to both claimants of such fund, to pay it over to either who will fully indemnify him, and save the expense of filing an interpleading bill, will not be deemed collusion where both neglect and refuse to give such indemnity; and where both claimants consent to give such indemnity, he can safely receive it from either. *Ib.* A strict bill of interpleader cannot be maintained by a bailee or agent, to settle the conflicting claims of bailor or principal, and a stranger who claims the property by a distinct and independent title. *Ib.* Neither can an attorney maintain such a bill, to settle the claim to money which he has collected for his client; where a mere stranger claims the money, upon the ground that the security upon which the money was collected, was originally obtained by his client wrongfully. *Ib.* The relation in which an attorney stands to his client will not permit him to file an ordinary bill of interpleader, upon any claim made to the fund which has been collected by him for his client. *Ib.* Whether, under any circumstances, an attorney can sustain a bill of interpleader against his client and a stranger, where the client is wholly irresponsible, and where he refuses to indemnify the attorney against the claim of such stranger, which is apparently well founded? *Quere.* *Merrin v. Ellwood and Titus*, 11 Paige, 365. To sustain such a bill, the complainant at least must show, that he has good reason to believe the adverse claim is well founded, and that there is no possibility of protecting himself from loss by any other means than by the interference of the court. *Ib.* See *Waterman's Am. Ch. Dig.* tit. BILL OF INTERPLEADER.

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v.
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*PENDLETON AND WIFE v. FAY AND OTHERS.

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Where the power to sell given to executors by the will is special, it can only be exercised in the mode prescribed by the testator.
Where an executor was authorized to sell the real estate at public vendue to pay off the legacies to the children of the testator as they became of age, and he sold the property at private sale to raise money for his own use, before the legacies became payable, the sale was held to be void.
A purchaser, wherever he has sufficient information to put him on inquiry

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in equity, is considered as having notice; and in such a case he will not be deemed a bona fide purchaser.

Where an insolvent trustee assigned a mortgage purporting on its face to be given to him as trustee, partly in payment of his own debt to the assignee and partly for cash which he applied to his own private use the assignee was held to be chargeable with notice of the misapplication of the trust fund.

If a mortgage while in the hands of the mortgagee is not a valid lien on the property, it will not be valid in the hands of the assignee of such mortgage.

Where a party takes a conveyance of trust property to enable the trustee to raise money thereon for his own private purposes, he is chargeable with the costs of a suit brought by the cestui que trust to set aside such conveyance.

May 4th.

FREDERICK DAVOUE, who died in 1809, by his will made provision for the education of his younger children; and gave to his sons Frederick, Benjamin A., and James B., legacies of \$5000 each, and to his son John B. a legacy of \$5500, when they became of age respectively; and to his daughters Ann, Mary Egbert, and Harriet, legacies of \$5000 each, when they became of age, or were married; all of which legacies were directed by the testator to be paid out of the bulk of his estate. By a subsequent clause of the will the testator directed that the legacies to Mary Egbert and Harriet should be at all events \$5000 each; and if the estate should prove insufficient to pay all the legacies, that a deduction be made from the legacies given to the other children to make up those legacies to the full amount. He likewise directed that so much of his real estate as should be necessary to furnish the sums he had bequeathed to his children, should be sold at public vendue when they should respectively be entitled to the same; and that the rest of his real estate should be leased or rented by the executors to the best advantage. He further directed that when his youngest child attained the full age of twenty-one years, all his real estate and property not otherwise disposed of should be sold at public vendue, and the proceeds of the sale, together with his personal property, should be divided,

share and share alike, between all his children or their lawful heirs. And he appointed his son-in-law Henry Fanning, his son Benjamin A., and Daniel Allen, of New-York, his executors. Benjamin A. died in the life time of his father, and Allen declined acting as executor. Probate of the will was therefore granted to Fanning as the sole executor thereof. Fanning squandered such portions of the estate as came into his possession, and then became insolvent. In April, 1817, Fanning being desirous of raising money on the property of the testator, made a pretended sale of a lot in the city of New-York belonging to the estate, called the bake house lot, to the defendant Fay, and took from him two bonds and mortgages for the purchase money, one for \$2000, and the other for \$1000. The whole object of this arrangement was to enable Fanning to raise money by selling these bonds and mortgages; and it was agreed between him and Fay that the latter should not be held personally liable for the payment of the bonds. When Fanning failed, in 1812 or 1813, he was indebted to Pott & M'Kinney in about the sum of \$1250. In May, 1817, Fanning offered to assign to them the bonds and mortgages taken from Fay, in satisfaction of their debt, if they would discount one third of the amount due to them and advance him the balance of the nominal amount of the bonds and mortgages in money or their own notes. Their debts against Fanning being entirely hopeless, they consented to this arrangement, and took an assignment of the bonds and mortgages. In 1819, Pott & M'Kinney failed, and assigned the bonds and mortgages to Archibald Gracie & Sons, to secure a large debt due to them. Gracie & Sons filed a bill against Fay and obtained a decree of foreclosure against him. Under this decree the lot was sold and bid in by A. Gracie for the nominal sum of \$1000. Gracie afterwards gave the property to his son Robert, and conveyed the same to him, with an understanding that if a certain debt due to him from his father should

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1830. <hr style="width: 100%;"/> Pendleton v. Fay.	not be paid *from other sources, this property should be applied in payment of that debt. In 1823, the bill in this cause was filed by Harriet Davoue, then an infant. She afterwards intermarried with J. B. Pendleton, and the suit was continued by a bill of revivor.
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C. F. Grim, for the complainants.

R. Sedgwick and *J. A. Dunlap*, for the defendants.

THE CHANCELLOR. The other children of F. Davoue, and particularly Mrs. Beardsley, have an interest in this question; and if the objection had not been expressly waived by the defendant's counsel on the argument, the cause must have stood over until a supplemental bill was filed, making them defendants. If the legal estate is in the heirs at law of Davoue, the court cannot direct a sale, which will give a good title to a purchaser, unless all the heirs and legatees are before the court. And neither, until the heirs and legatees are before the court, can an account of the rents and profits be taken and a distribution thereof made. But as a decision of the questions of right in this case may enable the parties and legatees to settle the matters in difference between themselves, I shall proceed to dispose of the cause so far as it can be decided between the present parties.

The power to sell, given by the will to the executors, was special, and could only be exercised in the mode prescribed by the testator. It authorizes them, as the legatees become of age, to sell so much of the estate as is necessary to pay their legacies respectively; and it directs the sale to be at public auction. Neither of these requisites appear to have been complied with in this case. This was not a sale at public auction; and the legatees, for whose benefit the executor pretended he was selling, were not of age. Independent of the question of fraud, this sale was wholly unauthorized and void, and nothing

passed by the conveyance to Fay. But if the executor had the power to sell, this conveyance was a fraud upon the legatees, and may be avoided by them. It is abundantly proved by the evidence in the cause, as well as by the answer of Fay, that the lot never was in fact sold to him. It was a mere device of Fanning to obtain the bonds and mortgages to enable him to commit a fraud upon some one. Although the bonds and mortgages were given in April, 1817, the deed was probably ante-dated, so as to appear to have been given in the month of September, 1816, to enable Fanning the more effectually to deceive the assignee of the securities, and to consummate the intended fraud. The only question which could have arisen on this part of the case, if the sale had been at auction, and after the legatees became of age, would have been, whether the loss should fall upon the assignees of Fanning, or upon the legatees. The mortgages in the hands of Fanning were void, and never could have been enforced against the interest of the legatees in the estate. They were assigned to Pott & M'Kinney, partly for cash and partly in payment of a debt due from Fanning, who was at the time notoriously insolvent. The assignment on its face showed that he was acting as executor. This was sufficient to put them on inquiry, and they ought not to have taken the assignment and paid the money, until they had ascertained that he was not committing a fraud upon the estate. It is not necessary to examine the numerous cases as to the question how far the purchaser from a trustee is bound to see to the application of the purchase money, where it has been paid in good faith to the trustee. That question is now put at rest by the revised statutes. But the question in this case is not reached by the statute; and is one as to which there never was any doubt. If a trustee applies the trust property to pay his own private debt to the purchaser, the latter is bound to ascertain that the trustee is not thereby misapplying the fund and violating his duty, especially when the trus-

1820.
Pendleton
v.
Fay.

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 Pendleton
 v.
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tee is insolvent. Wherever the purchaser has sufficient to put him on inquiry, he is in equity considered as having notice; and in such a case will not be deemed a bona fide purchaser. In this case the assignment was from Fanning as executor; and part of the consideration was the payment of his private debt to the assignees, who at the time knew he was insolvent. They undoubtedly supposed he could give them a valid title to the mortgages, or they would not have advanced the balance in money. But there was sufficient on the face of the transaction to create a strong suspicion that some other person *must suffer a loss, at least to the extent of the debt which was paid by the assignment. If the assignees had made the proper inquiries they would have ascertained that the whole was a fraud upon the legatees. The assignment from Pott & M'Kinney to Gracie & Co. was of the same character, except that the latter took the assignment in payment of an antecedent debt. The foreclosure of the mortgages and the purchase of the property by one of these assignees, only divested Fay's equity of redemption, if he ever had any, but did not alter the rights of the parties as against the legatees of Davoue. The gift of the property to R. Gracie, or its assignment to him to secure a debt then due to him, could not make him a bona fide purchaser for a valuable consideration as against the rights of the legatees. Besides these bonds and mortgages were mere choses in action, the assignment of which could not give to the assignees any greater equity against the estate than Fanning himself had. On the whole I am satisfied that no estate passed to Fay which could be legally transferred to any one; and that the mortgages in the hands of Fanning were mere nullities, so far as the estate of Davoue was concerned. And that if any estate did pass to Fay by the deed, the defendants are not entitled to protection as bona fide purchasers. The conveyance to Fay, and the mortgages from him to Fanning, must therefore be declared void, and must be delivered

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up and cancelled. The complainants are entitled to have the property sold, and the legacies to Mrs. Pendleton and Mrs. Beardsley must be first paid out of the proceeds. They will also be entitled to an account of the rents and profits of the bake house lot from Robert Gracie, since the same came into his possession. But I cannot direct either a sale or an account until other parties are before the court. I can only at present decree the conveyance to Fay, and the mortgages given by him, to be void; and direct a release to be given by R. Gracie, and that the possession of the premises be delivered up to the heirs of Davona. If the parties cannot compromise without further litigation, all further directions must be reserved, with liberty to the complainants to bring the other parties interested in the estate before the court by supplemental bill. So far as relates to the costs which have already accrued, the complainants are not entitled to any against the defendants, except as to Fay. He having permitted himself to be used by Fanning for an improper purpose, must pay the costs to which the complainants have been subjected in consequence thereof.

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v.
Dewey.

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HART AND OTHERS v. DEWEY AND OTHERS.

Merchants can by agreement prescribe the mode of charging and crediting interest upon the several items in running accounts between them, provided the mode adopted is not intended to be and is not in fact a cover for usury.

In the absence of any agreement, a creditor receiving a partial payment of a debt has the right of applying it first to the satisfaction of the interest then due before it is applied to the discharge of any part of the principal.

THIS was a bill filed by judgment creditors to reach certain property of their debtor in the hands of others. The cause was heard on exceptions to a master's report and on the equity reserved. May 4th.

1890.

S. A. Foot, for the complainants.*Hart*

v.

Dewey.*G. F. Tallman* and *R. Sedgwick*, for the defendants.

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THE CHANCELLOR. The report of the master as to the amount due from Nathan must be confirmed. That amount appears from the report to be \$435.06, casting the interest as Nathan insisted it should be cast in the account between him and Dewey. In running accounts between merchants, they have a right to agree upon the manner in which interest shall be charged and credited on the several items of debt and credit therein; provided it is not intended to be and is not in fact a cover for usury. Where there is no agreement or understanding to the contrary between the parties, the party receiving a partial payment has a legal right to apply so much thereof as is necessary to the satisfaction of the interest then due, before any part of the principal is cancelled. But the parties may agree upon a different mode of *doing the business, and may keep an interest account upon the items received and paid out. And this is the difference between the legal and the mercantile mode of computation. Perhaps in running accounts the latter is the most convenient mode. It certainly is not usurious. By the report of the master, it appears that the balance against Nathan, according to his own account, was \$98.40, and that there was also due \$336.66 for interest which he admitted was not included in that account through mistake. His counsel understanding his interest, if not his rights, better than he did himself, afterwards obtained a certificate from the master showing what the balance would be according to the legal mode of computing the interest. That however is no part of the master's report of the balance due. It is a mere computation to show what the interest would be by that method of computing it. The decision of the master was that \$435.06 was due; and it was to that decision the counsel to Nathan should have

excepted if he was dissatisfied therewith. That amount, with interest from the date of the master's report after deducting therefrom his costs in this suit to be taxed, must be paid over to the complainants or their solicitor in part satisfaction of their debts.

1890.
Hart
v.
Dewey.

If The Gas Light Company consents to the sale of the stock held by them as a collateral security to satisfy their debt and costs, so that the complainants can have the balance of the proceeds thereof, it must be sold at public auction under the direction of a master; and all necessary parties must join in the transfer thereof to the purchaser. And out of the proceeds thereof, the amount due The Gas Light Company with interest, after deducting dividends, to be ascertained and settled by the master, must be first paid, and then their costs and the costs of the president and secretary, except such part thereof as has been produced by unnecessarily serving in their defences, must be next paid; and the balance must be applied to the payment of the complainants' judgments and their costs in this suit to be taxed. And the residue, if any, is to be brought into court. But if The Gas Light Company do not consent to the sale, there must be a reference to a master to ascertain the amount due to them, *and the stock must be sold subject to that lien; and the purchaser must be permitted to redeem on paying the amount due with interest, at any time within three months after the sale. If they subject the other parties to the probable loss which will be occasioned by the latter inconvenient mode of selling, the company and their agents, who are parties in this suit, must bear their own costs. The complainants are also to be at liberty hereafter to apply on the foot of this decree for such further and other relief, to reach any other property or effects of the defendant Dewey, as may be just; and all other questions and directions are to be reserved.[1]

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[1] A debt contracted and partly paid before the method of calculating interest was changed, is subject to the present rule, viz: "to apply pay-

1830. — *Hart v. Dewey*. ments in discharge of the interest first, and calculate the interest on the balance in such manner as not to charge interest on interest." *Yancy v. Mutter*, Cam. & Nor. 513. If a sum of money is paid in part of a debt due on a bond and mortgage carrying interest, before the expiration of the year, such payment is to be deducted from the interest then due, and the residue, if any, from the principal, and the balance thus ascertained decreed to be paid with interest thereon until paid. *Lamott v. Sterett*, 1 Har. & Johns. 42. The rule for casting interest, when partial payments have been made, is to apply the payments in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal; and interest is to be computed on the balance of principal as aforesaid. *Connecticut v. Jackson*, 1 Johns. Ch. Rep. 17. *Black v. Blakely*, 2 McCord's Ch. Rep. 10. *Wright v. Wright*, 2 McCord's Ch. Rep. 204. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209. *Lightfoot v. Price*, 4 Hen. & Munf. 431. *Williams v. Houghtaling*, 3 Cowen, 87, note (a), where all the authorities upon this point may be found. As a general rule in South Carolina, interest is not to be calculated with annual rests, on moneys in executors' hands. *Wright v. Wright*, 2 McCord's Ch. Rep. 202. The rule for calculating interest on accounts against persons in a fiduciary situation, is to allow interest on the annual balances, but not to be compounded. *Rowland v. Best*, 2 McCord's Ch. Rep. 321. Whether the practice prevailing with merchants, in settling their accounts, to state an interest account, in which interest is charged on each item of the principal on the debit side, and credited on each item on the credit side of the account, is to be adopted as correct? *quære*. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 210. The period of the dissolution of partnership is the proper time to make a rest and adjust the balance of the partnership account; and the partner against whom the balance is found is chargeable with interest thereon. *Ib.* As to the mode of computing interest where a partial payment is made upon a demand bearing interest before either principal or interest has become due, see *Williams v. Houghtaling*, 3 Cowen, 86; *Tracy v. Wikoff*, 1 Dallas, 124. On a bond, conditioned to pay with interest at six per cent., for the security of which mortgage has been taken, the plaintiffs, after a forfeiture, are not entitled to seven per cent., the lawful interest. But interest is to be paid according to the contract, till it ceases to operate by being merged in the decree. *Miller v. Burroughs*, 4 Johns. Ch. Rep. 436. Where payments have been made, interest must be calculated on the principal up to the time of payment, the amount paid deducted, and the balance charged as principal. *Jones v. Ward*, 10 Yerger, 161. See Waterman's Am. Ch. Dig. tit. *INTEREST*.

1830.

Badeau
v.
Rogers.

BADÉAU v. ROGERS AND SECORD.

The object of a bill of interpleader is to protect a complainant standing in the situation of an innocent stakeholder, and where a recovery against him by one claimant of the fund might not protect him against a recovery by another claimant.

It is not necessary to file a bill of interpleader where the holder of the fund is already a party to a suit in chancery, brought by one claimant against the other to settle the right to the funds in his hands.

In such a case the holder of the fund should apply by petition in that suit for leave to pay the fund into court to abide the event of the litigation between the other parties.

If a defendant permits a bill of interpleader to be taken as confessed against him, it is an admission that as to him the bill was properly filed, and that he has made an improper claim upon the fund.

The complainant is entitled to his costs out of the fund only in those cases where the bill of interpleader is necessarily and properly filed as against both defendants.

But if one of the defendants suffers the bill of interpleader to be taken as confessed against him, he will be personally charged with all the costs which have been produced in consequence of his unjust claim upon the fund.

THE complainant filed his bill in this cause in the nature of a bill of interpleader, to redeem a mortgage given by G. Underhill to D. Pelton, J. Bonnet and D. Rogers, junior, as executors of W. Henderson; which mortgage was a lien on property which now belongs to the complainant. Pelton and Bonnet, two of the executors of Henderson, in 1823, assigned the mortgage to Secord. After their death, Rogers *filed a bill against Secord to set aside the assignment. Secord applied to the complainant in this cause to pay the mortgage, and offered to indemnify him against the claim of Rogers. The complainant declining to pay the money, Secord filed a bill against him to foreclose the mortgage. Rogers afterwards amended his bill and made Badeau a party defendant therein. This bill was then filed; and in June, 1827, an order was

May 4th.

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v.

Rogers.

made staying all proceedings in the other suits against the complainant, upon his paying into court the amount due on the mortgage with interest. The money was paid to the assistant register, and the bill in this cause was afterwards taken as confessed against the defendant Rogers. Secord put in his answer, insisting upon his right to the money, and that the complainant ought to pay the costs of the foreclosure suit which had been occasioned by his unreasonable refusal to pay over the money on the offer of a full indemnity.

P. A. Jay, for the complainant.

W. Silliman, for the defendant Secord.

W. N. Dyckman, for the defendant Rogers.

THE CHANCELLOR. The object of a bill of interpleader is to protect the complainant where he stands in the situation of a stakeholder, not knowing to whom to pay the money or to deliver the property in his hands; and where a recovery against him at the suit of one party might not be a protection against the claim made by the other. Such does not appear to have been the situation of the complainant at the time this bill was filed. All the present parties were then before the court in the suit commenced by Rogers in relation to the alleged fraud in the assignment; and the complainant and Secord were also before this court in the suit commenced by the latter for the foreclosure of the mortgage. Without reference to the offer to indemnify the complainant against the claim of Rogers, there was therefore no necessity for filing this bill. If the complainant had presented a petition to the court in those

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two suits, there can be no doubt *that the chancellor would have authorized him to pay the money into court, to abide the event of the litigation between Rogers and Secord, and would have stayed all further proceedings against him

(*Low v. Richardson*, 3 Mad. R. 277.) If Rogers had answered in this suit and claimed the money, and had insisted on these facts, I should have thought it my duty to dismiss this bill as unnecessarily and improperly filed. But by suffering it to be taken as confessed, Rogers admits it to be properly filed as against him, and that he had made an unjust claim upon the fund. The complainant is therefore entitled to an injunction or order for a perpetual stay of proceedings on the part of Rogers against him, and to recover against the latter his costs in this suit to be taxed. Under the circumstances of this case, I do not think the complainant is entitled to claim his costs out of the fund in court. That belongs to Secord by the neglect of Rogers to appear and claim it in this suit; and I also think the complainant ought to pay Secord the costs in the suit brought to foreclose the mortgage which had been commenced previous to the time the bill in this cause was filed. On the receipt of those costs, Secord must cancel the mortgage on record. He will then be entitled to the fund in court; and Rogers must pay to him his costs in this suit to be taxed. On a bill of interpleader rightfully and necessarily filed, the complainant is entitled to his costs out of the fund which is the subject of the suit; and he is not obliged to take his chance of getting them from the defendant against whose claim the court eventually decides. But the circumstances of this case do not bring it within the reasons on which that rule is founded.

1830.

Leggett

v.

Dubin.

LEGGETT v. DUBOIS.

On the death of a party to a suit in chancery, if the cause of action survives to or against some other of the parties, so that a perfect decree as to every part of the subject of litigation can be made between the surviving parties, the suit does not abate as to the survivors; and on motion of either party, the court will order the suit to proceed between such survivors.

1880.

Leggett
v.
Dubois.

Where the cause of action against a deceased party does not survive, but some third person becomes vested with his interest or subject to his liabilities, the complainant may elect to proceed without reviving the suit against the representatives of the deceased party, provided a perfect decree can be made between the survivors without bringing such representatives before the court.

In such cases, the complainant must revive the suit against the representatives of the deceased party, or elect to proceed against the surviving defendants within such time as may be deemed reasonable by the court, or the defendants may revive the suit.

To revive a suit under the provisions of the revised statutes, without a bill of revivor, the party must proceed upon petition, which is a substitute for the bill of revivor.

But an order to proceed without reviving may be obtained on an affidavit showing the death of the party, and that the cause of action has survived.

Whether a suit can be revived against absentees or infants who succeed to the rights of a deceased party without a formal bill of revivor? *Quære*. If a suit abates pending an injunction, the defendant or his representatives who are restrained by such injunction may have an order that the complainant or his representatives revive within such reasonable time as may be fixed by the court for that purpose, or that the injunction be dissolved.

May 4th.

THE bill in this cause was filed to compel the specific performance of an agreement made by the Rev. J. Sellon, now deceased, with the complainant, relative to the sale or exchange of a small piece of land between Beekman and Ann streets in the city of New York; of which land it was alleged that Sellon was the real owner, or the cestui que trust, and that H. Walton was his trustee. It was further alleged in the complainant's bill that the land in question was conveyed to the other defendants, or some of them, after notice of the complainant's rights, and while it was held adversely by him. An answer having been put in by a part of the defendants, the cause was at issue as to them. The answer of Sellon was adjudged insufficient; and he was in contempt for not answering at the time of his death in March last.

J. Lynch, for the surviving defendants, upon an affidavit of the death of Sellon, and that an injunction had been

issued in the cause restraining them from proceeding in their suit at law, moved that this cause might proceed against the surviving defendants ; or for such other order as the court might think proper to grant, under the circumstances of the case.

1840.

Leggett
v.
Dabcia.

T. Fassenden, on the part of the complainant, read affidavits showing that he considered it necessary to the attainment of the objects of the suit that the representatives of Sellon should be made parties thereto. He contended that this was not a case of survivorship, and that neither party had a right to proceed in the suit without reviving the same.

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THE CHANCELLOR. The cases intended to be embraced by the 107th section of the title of the revised statutes which relates particularly to this court, (2 R. S. 184,) are those where the right of the deceased party vests in some or one of the survivors ; so that a perfect decree may be made as to every part of the subject of litigation, without any alteration of the proceedings, or bringing any new parties before the court. Such is the case of a suit brought by or against two or more executors, trustees or joint tenants ; where, on the death of one, the whole right of action or ground of relief survives in favor of or against the other. In such cases, there is in fact no abatement as to the survivors ; and upon a proper application by either party on affidavit, showing the fact of the death, and that the cause of action has survived, the court will order the suit to proceed. The 108th section provides for another class of cases, where some of the parties survive and the rights of the parties dying do not survive to them, but some other person becomes vested with the rights and interests, or is subject to the liabilities of those who are dead. In such cases, the complainants may proceed without making those persons parties, provided a decree can be made between the surviving parties without bringing

1880.

Leggett
v.
Dubois.

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such persons before the court. The decree, in that will not affect those in whom the rights of the deceased parties have become vested. Under a similar provision in the former statutes of this state, Chancellor Sanborn decided that it was optional with the surviving complainant to revive the suit or to proceed without reviving that he was not bound to do either; that he might to abandon the suit. (1 Hopk. R. 450.) The revised statutes have provided for such cases; and the surviving defendants may now revive the suit if the complainant or those who are entitled to revive in the first place elect to do so within such time as may be allowed by the court for that purpose. The proceedings to obtain a revival of the suit, under these provisions of the revised statutes, must be by petition; and an order for that purpose cannot be granted on motion founded on affidavit. The petition is the substitute for a bill of revivor. A formal bill may perhaps be necessary where the representatives of the deceased party cannot be found, or where they are infants. (7 John. R. 613, per Van Ness, J.) It is undoubtedly the duty of the complainant to revive if he wishes to proceed with the suit, and to have the benefit of the previous proceedings. And where a suit is dismissed by the death of either of the parties pending an injunction, the defendant or his representatives may have an order that the complainant or his representatives revive the suit within a reasonable time, or that the injunction be dissolved. (1 Hen. & Munf. 203. 1 Cox's Ca. 411. 2 id.)

In this case, there has not as yet been any unreasonable delay on the part of the complainant; but he must, within sixty days, proceed to revive the suit against the representatives of Sellon, or consent to proceed against the surviving defendants only, or the injunction must be dissolved.

1890.

Matter of Atkinson.

IN THE MATTER OF F. ATKINSON'S WILL.

In issuing a commission to take proof of a will in a foreign country for the purpose of establishing the same and having it recorded as a will of real estate within this state, the same notice of the application for a commission must be given to the heirs at law of the testator and the persons interested in contesting the will, as is required upon proving a will before a surrogate.

Persons authorized to contest the validity of the will may join in the commission, and may be permitted to name a commissioner on their part; and they will also be entitled to reasonable notice of the time and place of executing the commission.

THIS was an application on the part of three of the devisees of Francis Atkinson, late of Kirbymoorside, in the county of York, in England, deceased, for a commission to take the proof of the execution of his will; for the purpose of having it established and recorded as a will of certain real *property situated within this state. By their petition it appeared that the testator was a citizen of the United States, but resided in England and died there. That he made a will and two codicils, duly executed according to the laws of this state to pass real estate; and that all the witnesses thereto resided in England. That all the heirs at law of the testator capable of inheriting lands within this state, except the petitioners, resided in the United States; and that one of them resided at Rochester in this state. That the will and codicils had been duly proved as to the personal estate in the prerogative court of Canterbury, where, by the laws of England, the originals are filed and must remain on record.

May 8th.

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J. Rhoades, for the petitioners, asked that a commission might be issued to take proof of a duly authenticated copy of the will and codicils; and as there was no dispute as to the validity thereof, that notice to the heirs at law might be dispensed with in this case.

CASES IN CHANCERY.

THE CHANCELLOR. The petitioners have complied with all the requisites to entitle them to a commission. And if the facts are correctly stated in the petition, which there is no reason to doubt, they are also entitled to have the authenticated copies of the will and codicils proved and recorded instead of the originals, which cannot be obtained from the ecclesiastical court at Doctors Commons. The only questions which arise are as to the propriety in any case of issuing such a commission wholly ex parte, and without giving those who may have an interest in contesting the validity of the will an opportunity to join in the commission, or to object to the commissioners named by the petitioners; and whether and what notice should be given to the heirs at law to appear and contest the validity of the will. The legislature have given to the chancellor an unlimited discretion on this subject; and in this particular case, where probate is perhaps mere form, it is probable no objection could arise from issuing an ex parte commission, or from permitting it to be executed without any notice to the heirs at law. But as this is the first application which has been made *under the recent statute, I am unwilling to establish a precedent that may lead to abuse in cases which may hereafter occur. The record of the proof of a will of real estate is only presumptive evidence of due execution thereof and of the capacity of the testator. Yet in relation to wills executed in a foreign country, proof will in most cases be in fact conclusive upon the rights of the heirs at law; in consequence of the difficulty and expense of repelling such proof in each particular suit which may be brought here in relation to the estate. But few causes therefore will arise where the chancellor in the exercise of a sound discretion, could permit a will to be proved and recorded without any notice to those who have an interest to contest its validity. If it appears from the petition that there was no heir at law of taking the estate by descent, it might be necessary

direct notice to be given to the attorney general ; so that the rights of the people might be protected and preserved. 1830.
Matter of Atkinson.

Personal service of notice may not be necessary where the parties interested live out of the state. And probably the notice required by the statute on the proof of such wills before the surrogate would be the best mode of giving information that a commission is applied for. If the heirs at law claim the estate, they probably will have some agent here to attend to their rights ; or they may employ a solicitor and file a caveat with the register to prevent a commission from being issued without giving them an opportunity to join therein. Where they appear and signify their wish to contest the will, the court can then direct such notice of the time and place of the execution of the commission to be given as may be proper.

In this case an order must be entered directing the heirs at law and all other persons interested in contesting the validity of the will or codicils, to show cause before the chancellor, on the first Tuesday of July next, why a commission should not issue to take proof of the authenticated copies of the original will and codicils on file in the prerogative court of Canterbury ; to the end that the same may be recorded as a will of the real estate of the testator situated within this state. A copy of the order must be published in the state *paper weekly for six weeks previous to that time, and a copy thereof must be served on the heir at law who resides at Rochester, either personally or, in case of his absence, by leaving the same at his residence, at least twenty days before the time appointed for showing cause. And in case any person authorized to contest the validity of the will or codicils appear and shows his right to contest the same, he will be permitted to join in the commission. He will also be allowed to name a commissioner on his part, and will be entitled to such reasonable notice of the time and place of executing the commission, and to be given in such manner, as the court may then think proper to direct. The necessary

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1830. directions will also be given at that time as to the manner of executing and returning the commission.

White
v.
Carpenter.

WHITE v. CARPENTER AND OTHERS.

A resulting trust cannot be raised in favor of a person, against the intention of the parties.

A bona fide purchaser of trust property from a trustee, without notice of the trust, is not bound to see that the purchase money is applied to the objects of the trust.

In chancery, the general lien of a judgment is controlled by equity; to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof.

A party who has a specific equitable lien on real property, or the proceeds thereof, is entitled to a preference over the general lien of a creditor under a subsequent judgment.

Where L. being entitled to one undivided third part of his father's estate exchanged with W. one half of his interest in said estate for some Virginia lands; and L. conveyed to S. all his interest in his father's estate in trust to pay W. \$3000 out of the proceeds thereof in full satisfaction for the Virginia lands, and if any more was realized out of said estate the surplus was to be retained by S. as a compensation for his services; and S. afterwards failed and W. filed a bill for the payment of the \$3000 or that L.'s estate might be sold to pay the same; and L. then with the consent of W. conveyed said estate to M. in trust to sell the same, and the first place to pay W. his said demand of \$3000, and then to pay the residue to certain creditors named in a schedule, provided such creditors released their claims against S. by the 1st May thereafter; and in any of such creditors refused to execute releases, their share of the due was to be paid to S. or to his assigns; three of the creditors named in the schedule having neglected to comply with the condition, S. on the 18th May, 1818, conveyed to H. all the interest intended for those creditors; H. was afterwards discharged under the insolvent act, and his assignees conveyed all his interest in the property to E.; after the conveyance from L. to S. and before the execution of the trust deed to M. P. F. recovered a judgment against S. in the supreme court; in May 1822, E. purchased this judgment for \$328, the amount then due thereon, and at the time of the purchase S. gave his note to E. for the whole part of the judgment, and E. agreed that if the note was paid, the judgment should only be enforced against the property conveyed in trust to M.; E. afterwards sold under the judgment all the right in the estate so conveyed to M., and purchased the same himself.

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§25; at the sale W. gave notice of his claim for \$3000 upon the estate; it was held that the judgment of P. F. only attached upon the interest E. had in the real estate of L. after satisfying W.'s debt; and as E. had notice of W.'s claim previous to the sale under the judgment, the only effect of such sale was to turn E.'s general lien upon the surplus into a specific lien to the extent of his bid.

1830.

White
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ROBERT LYLURN, of the city of New York, died in 1814, possessed of a considerable real and personal estate within the state of New York. By his will, after directing the payment of certain pecuniary legacies, he gave to his wife a part of the real estate and also an annuity during her life or widowhood in lieu of dower. The residue of his property, both real and personal, he gave to his son John Lylburn, and his two other children, in equal proportions. In March, 1817, Joseph Willard was in the city of New York endeavoring to sell certain large tracts of land in the state of Virginia; and Augustus Sackett, who then kept an office in that city for the purchase and sale of lands, was employed by Willard to assist him in the sale. An arrangement was made by which Willard was to convey to J. Lylburn a part of his Virginia lands in exchange for one half of Lylburn's interest in his father's estate. That interest was conveyed by Lylburn to Sackett, who was to pay over to Willard \$3000 out of the proceeds thereof, as soon as the same could be realized from the estate, in full satisfaction for the Virginia lands. And if a greater sum was received from the interest of Lylburn in his father's estate, Sackett was to retain the same as a compensation for his trouble and expense in negotiating the exchange of property between Lylburn and Willard. Willard gave a bond to Lylburn, by which he bound himself to convey to Lylburn the lands in Virginia when the latter should locate the same; which bond has since been satisfied to the assignee of Lylburn. An order was also drawn by Lylburn and accepted by Sackett, in the following words: "Augustus Sackett, Esquire, you will please to pay over to Joseph Willard \$3000, when you receive

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1820. it from the proceeds of my estate devised to me by my
 White late father Robert Lylburn, deceased, it being the value I
 v. place upon the said estate and all that I am to give the
 Carpenter. said Joseph Willard for six thousand acres of land purchased of him, lying in the counties of Greenbriar, Monro and Giles or Kenahwa, or in which county I may select the same, in the state of Virginia. And in case the said estate, upon final settlement, shall amount to any sum over the said \$3000, you are to retain the same as a compensation for your trouble and expense you may be at in selling the said estate and negotiating the exchange of property between said Joseph Willard and myself. In witness whereof I have hereunto set my hand and seal the twentieth day of March, 1817.

John Lylburn. [L. s.]

"Signed, sealed and delivered in presence of Charles L. H. Shefflin, Elihu C. Sackett.

"Accepted 20th March, 1817, Augustus Sackett."

In January, 1818, Sackett having become insolvent, Willard filed his bill in this court to compel the payment of the \$3000, or obtain a decree for the sale of the estate to discharge the same. And an injunction was granted restraining Sackett from making any disposition of the property, calculated to impair Willard's rights therein. In April of the same year a compromise was effected between Willard and Sackett; and a conveyance was made and executed between Sackett and his wife of the first part, Sylvanus Miller of the second part, and Willard of the third part; which recited that Sackett in part owned and held in trust one sixth part of the Lylburn estate, and that Willard claimed to have a lien on the estate; that Sackett was indebted to various persons named in a schedule annexed, and that he was desirous, with the approbation of Willard, to provide for the payment of those debts; and by which conveyance the parties of the first part, with the consent of Willard, conveyed to *Miller the

Lylburn estate in trust to sell and convert the same into money, and out of the proceeds thereof in the first place to pay to Willard the \$3000 and interest; and in the second place to pay the residue to the creditors named in the schedule, rateably, upon condition they released their claims against Sackett by the 1st of May thereafter. And in case of the refusal of any of them to execute releases, their share of the residue was by the terms of the conveyance to be paid to Sackett or to his assigns. Clark, Hitchcock and Jacobs, three of the creditors named in the schedule, having neglected to comply with this condition, Sackett, on the 8th of May, 1818, conveyed to W. S. Hart all the interest which was intended for these creditors under the deed to Miller. Hart was afterwards discharged under the insolvent act; and in April, 1822, his assignees conveyed to Elihu White, the complainant, all the interest he had acquired in the property under the conveyance from Sackett. After the conveyance from Lylburn, and before the execution of the trust deed to Miller, Patrick Farrelly recovered a judgment against Sackett in the supreme court, which was docketed on the 25th of October, 1817. In May, 1822, White purchased this judgment for \$328.72, the amount then due thereon. Sackett gave his note to White for the whole or a part of the amount due on the judgment, and the latter agreed if the note was paid that the judgment should not be enforced against the real estate of Sackett out of the city of New York, but only against the property he (Sackett) conveyed to Miller in trust. Sackett at the same time gave to White a written stipulation that he might at any time cause an execution to be issued upon the judgment. An execution was afterwards issued upon this judgment to the sheriff of New York; and all the right of Sackett to the Lylburn estate in that city was, on the 12th of July, 1822, sold, and was purchased in by White for \$25, to whom the sheriff gave a certificate of the sale. At the sale, the counsel for Willard attended and gave notice of his claim to the prop-

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1820. erty. In November, 1818, Willard, Miller and others,
 White claiming an interest in the estate of Robert Lylburn, to-
 gether with the creditors named in the schedule to the
 trust deeds, filed a bill in this court against the executors
 of the will of *Robert Lylburn and others, for a division
 [*221] and partition of the estate, and for an account of the per-
 sonal estate and of the rents and profits of the real estate;
 and in June, 1822, a decree was obtained in such suit for
 the sale of the real estate. After the sale by the sheriff
 on the judgment, the complainant filed his bill in this suit
 against the parties on the partition suit to obtain the one
 sixth part of the Lylburn property; and in February
 1823, he entered into a stipulation with the parties in that
 suit, by which it was agreed he should join in the convey-
 ances to the purchasers at the sale under the decree in
 partition, without prejudice to the rights of any of the par-
 ties; and that he would pursue his remedy only against
 the proceeds on such sale. The property was sold in the
 suit, and a final decree was made therein, by which the
 rights of all the parties in the estate were disposed of, ex-
 cept as to the one sixth arising from the half of John Lyl-
 burn's share originally conveyed to Sackett. That amount
 was directed to be paid to the assistant register, to abide
 the further order of this court. Willard having died, the
 cause was continued against Carpenter and wife, his per-
 sonal representatives. It was heard on the pleadings and
 proofs before the late Chancellor Jones; who in June
 1827, decided that White was entitled to the amount due
 on the Farrelly judgment at the time of the assignment
 thereof to him, with interest, to be paid out of the fund
 in court; and he directed that a reference be had to one
 of the masters of this court if necessary, to ascertain the
 amount due; and he refused to allow costs to either party
 as against the other.

The following is the opinion of the late chancellor on
 which the original decree in this cause was founded :

OPINION OF CHANCELLOR JONES. John Lylburn being entitled under the will of his father, Robert Lylburn, to one third part of the real and personal estate of Robert Lylburn, the testator, and having previously conveyed one half part thereof to one Benjamin Field, on the 19th March, 1817, for the consideration of \$3000 as expressed in the deed of conveyance thereof, sold and conveyed all the residue of his interest in the estate of his said father, being the remaining half of his original share, or the one sixth part of the said estate, to Augustus Sackett.

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Augustus Sackett, on the first day of April, 1818, by indenture of that date, made between him the said Augustus Sackett and Minerva his wife, of the first part, Sylvanus Miller, of the city of New York, of the second part, and the defendant Joseph Willard of the third part, after reciting in substance that he (Sackett) was entitled, as therein stated, to the said one sixth part of the said estate of Lylburn, estimated at the sum or value of \$9,818 33, and was indebted to the persons named in the schedule to the indenture annexed, in consideration of the premises and of one dollar to the grantors in hand paid, granted and conveyed the said one sixth part of the said estate of Lylburn to Miller, in trust after converting the same into money and paying expenses, to pay first to the defendant Willard \$3000 with interest from that date, and then to distribute and pay the residue to the several creditors named in the schedule, in rateable proportions, according to the amounts therein stated to be due to them respectively; with a proviso or condition in the said indenture to the following effect: that the said creditors should severally, on or before the first day of May then next, execute to Sackett absolute discharges of their respective demands against him, and should cancel of record any judgments which they might have against him; and in default of performance of that condition, the rights of all the creditors so in default to be forfeited as to any benefit they might otherwise derive from the indenture, and the pro-

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vision thereby made for them was immediately to cease, and revert to Sackett, the grantor. None of the creditors complied with the condition; consequently the interest set apart to them reverted to Sackett, and became, after the first day of May, 1818, subject to his disposal.[1]

[1] See Waterman's Am. Ch. Dig. tit. TRUSTS. Where a purchase is made in the name of one person and the purchase money is paid by another, there is a resulting trust in favor of him who made the payment. *M'Guire v. M'Cowen*, 4 Desau. 491. *Perry v. Head*, 1 A. K. Marsh. 47. *Letcher v. Letcher's heirs*, 4 J. J. Marsh. 592. *Elliott v. Armstrong*, 1 Blackf. 198. *Jenison v. Graves*, 2 Blackf. 440. *Doyle v. Sleeper*, 1 Dana, 536. *Boyd v. M'Lean*, 1 Johns. Ch. Rep. 582. *Botsford v. Burr*, 2 Johns. Ch. Rep. 409. The statute of frauds requires all declarations of trusts in land to be proved by written testimony; but those trusts which arise by the mere operation of law, are excepted out of the statute, and may be proved by parol evidence. *Elliott v. Armstrong*, 2 Blackf. 198. A. made a verbal contract for the purchase of a town lot; and during A.'s absence from the country, B. partly with his own money, but principally with A.'s property, completed the contract for A., and took the deed in the name, and for the benefit of A. Held, that A.'s subsequent ratification of B.'s acts made him liable to B. for the amount paid for him by B.; and also rendered the lot, as A.'s property, liable from the date of the deed to a judgment against him in favor of B. *Ib.* Where there is a resulting trust under a conveyance, it must arise at the time of the execution of the deed. *Rogers v. Murray*, 3 Paige, 390. After the legal title has passed to the grantee by the execution of deed, a resulting trust cannot be raised by the subsequent application of the fund of a third person for the improvement of the property, or for the payment of the purchase money, so as to divest the legal estate of the grantee. *Ib.* A resulting trust cannot be raised against the intention of the parties. *White v. Carpenter*, 2 Paige, 217. Resulting trusts must be positively alleged and indisputably proved. *Hickey v. Young*, 1 J. J. Marsh. 3. To make the purchaser of a legal title a trust for the cestui que trust, it is not necessary that he should have notice of the particular cestui que trust. It is sufficient to have notice that the person from whom he buys is only a trustee. *Maples v. Medlin*, 1 Murphy, 219. Loose and general declarations of intention, by one member of a family, of holding property in trust for the other members, are not sufficient for the deduction of a trust. Letters and accounts addressed by a person to his brothers, under the circumstances, were held insufficient to raise a trust by implication to the father. *Steere v. Steere*, 5 Johns. Ch. Rep. 1. In cases of implied trusts for the benefit of creditors, if one of the creditors comes into the court of chancery to enforce the execution of the trust, the court will act upon the principle that equality is equity: except in cases

On the 8th May, 1818, Sackett conveyed to William S. Hart an interest under the deed of conveyance to Miller, particularly described in the deed to Hart as forfeited by

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where such creditor has acquired a specific lien upon the fund by his superior vigilance, or where he is entitled to a legal preference. *Egberts v. Wood*, 3 Paige, 517. If a joint purchase be made in the name of one of the co-purchasers, parol evidence is admissible to prove the fact, and he will be held a trustee for a moiety, for the other. Such a case is not within the statute of frauds, and is a resulting trust. *Powell v. Monson and Brimfield Mss. Co.*, 3 Mason, 347. Lands purchased by the husband with the separate moneys of his wife, in his own name, enure to her benefit as a resulting trust, and he must account for the rents and profits. *Methodist Episcopal Church v. Jacques*, 1 Johns. Ch. Rep. 450. And a purchaser from the husband in such case, with notice of the trust, takes the land subject to the trust. 1b. If A. purchase slaves in his own name, with money partly belonging to himself, and partly to others, and which had been put into his hands for that purpose, he will hold them in trust for others according to the extent of their interest. *Stephenson v. Stephenson*, 3 Bibb, 15. Where one of two partners bought lands, taking the deed in his own name, but giving the partnership note in part payment, which was paid at maturity by the other partner, and otherwise under circumstances which indicated the purchase to be intended as a partnership transaction, it was held, that a trust as to one moiety resulted to the other partner. *Hart v. Hawkins*, 3 Bibb, 504. What acts will estop a party from setting up a resulting trust. *Thompson et al. v. Murray et al.*, 2 Hill, 210. Land was sold under execution, and after the defendant in the execution had remained four or five years in possession, the purchaser obtained the sheriff's deed. The defendant in execution then filed his bill alleging that the land was purchased at his request, for him, and with his money, and that the purchaser had fraudulently taken the deed to himself. All of which was denied. If upon such an understanding, the defendant in the execution had furnished the purchaser with the money before he made the payment, the law would imply a resulting trust in favor of the execution defendant. But very clear proof of that fact would be required to establish the trust. And upon its being established a decree, not to annul the purchaser's deed, but requiring him to convey to his cestui que trust, would be proper. But if the purchaser paid for the land with his own money, and the defendant in the execution afterward refunded it to him, the law would not on that ground imply any trust in the case—although the money was in fact so refunded upon an agreement to permit the defendant in the execution to keep the land. *Graves v. Dugan*, 6 Dana, 331. A court of chancery will relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured thereby. *Brown v. Lynch*, 1 Paige, 147. When a person by fraud obtains a legal title to the estate of another he is

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the neglect of William Hitchcock, Joseph Jacobs Thomas E. Clark, creditors of Sackett, to release and charge him from their demands, and as being an int of \$4000 in the estate of Robert Lylburn, deceased, or interest in said estate as \$4000 bears to \$9,818 33, the sixth part of said estate.

On the 6th November, 1821, Hart having become solvent, did, under the act entitled "An act to abolish imprisonment for debt in certain cases," passed April 1819, and in pursuance of an order of the recorder of city of New York, make an assignment of all his es to Luther Bingham, Lewis E. Seger and Frederick Tallmadge, assignees duly appointed for that purpos trust for the benefit of his creditors.

On the 3d April, 1822, the said Luther Bingham, L E. Seger and Frederick A. Tallmadge, the said assign by indenture of that date, granted and conveyed to E White, the complainant, the aforesaid indenture exec by Sackett to Hart, and all and singular the rights, cla interests and premises thereby granted, or intended s be, or which it was in the power of the said assignee convey.

It further appears that one Patrick Farelly, on or al the 25th October, 1817, recovered a judgment aga Sackett in the supreme court of judicature of the state New York for \$2400 debt and \$87.26 damages and co which was docketed on that day; that an execution issued on that judgment directed to the sheriff of the and county of New York, and all the right, title and in est of Sackett at the time of the docketing of the judgment, or at any time afterwards, in certain par considered as a trustee, and equity will compel a conveyance. *Perkins v. Hays*, 1 Cooke, 166. A. sold B. certain property, for the payment of which B. gave his bond. A. afterward died, and in his will devised a legacy to C. £150, which he directed to be paid by B. out of the said property money. The court of chancery construed B. as a trustee in whose hands money was deposited for the benefit of C., and compelled him to pay the legacy. *Swearingham v. Stull's ex'rs.*, 4 Har. & M'Hen. 38.

of real estate whereof Robert Lylburn, deceased, died seized, situated in the city of New York, and comprising the whole of the real estate of the said Robert Lylburn at the time of his death in the said city, was sold by the said sheriff, by virtue of the said execution, on the 13th July, 1822, and purchased in by the complainant for his own benefit and indemnity, he being at the time the proprietor of the said judgment by a previous assignment thereof to him, and which judgment is still unsatisfied.

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Under the first of these titles, the complainant claims to be entitled to the interest in the estate of Robert Lylburn, deceased, specified in the deed of assignment and conveyance from Sackett to Hart; and under the second title, to one sixth part of all the estate of Lylburn, covered by the judgment at the time it was docketed, and which one sixth part of that estate was then vested in Sackett, and he demands an account from the executors of the will of Robert Lylburn, deceased, of the one sixth of what they have realized from their testator's estate, subject to a provision for the widow's annuity under the will; and that the one sixth of the proceeds of any sales to be made under the decree in the pleadings mentioned may be brought into court and invested, and he prays for an injunction to restrain the defendants from intermeddling with the said one sixth of the proceeds of the said sales, until the further order of the court, and for general relief.

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The claim is resisted by the defendant, Joseph Willard, who defends the suit, and who insists on the right to have the sum of \$3000, with interest, satisfied and paid to him by and out of the one sixth part or share of the estate of Robert Lylburn, deceased, assigned and conveyed by John Lylburn to Augustus Sackett, in priority and preference to the satisfaction of the claims of the complainant; and contends that the satisfaction of any demand the complainant may have upon that portion of the estate is to be postponed to the payment of his said claim of \$3000 and interest.

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The claim of the defendant Willard to the \$3000 he demands, has its origin in the purchase by Sackett of the one half of the share or interest of John Lylburn in the estate of his father, Robert Lylburn, and which purchase he alleges was made by Sackett as his agent, and paid for in lands belonging to him in the state of Virginia; and he alleges and insists that by the terms of the arrangement under which that interest was conveyed by Lylburn to Sackett, and vested in Sackett, he (Willard) was to have \$3000 out of it, and to become interested to that amount in the premises held by Sackett.

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The substance of the statements of the answer on this point is, that the defendant Willard, in March, 1818, employed Sackett, who was a broker, to sell for him sundry tracts of land in the state of Virginia; and that on the 19th of that month, Sackett informed him that John Lylburn wished to exchange his share in the deceased father's estate for lands, and would, for 6000 acres of the defendant's Virginia lands, convey his entire share of the said estate; and that by means of that estate, he (Sackett) could raise for Willard the sum of \$3000; and that it was understood and agreed upon between him (Sackett) and Lylburn, that he (Sackett) should have whatever he could make of the said share of the said estate so to be conveyed to him beyond that amount; that Sackett promised to pay the defendant Willard the said sum of \$3000 immediately after the deed of conveyance from Lylburn to him should be executed and recorded; that the money was to be raised on the credit and security of the said conveyance, or out of the property or interest to be granted thereby, and that the same was for that reason to be vested in Sackett; and that he, the defendant Willard, relying on the promises and assurances of Sackett, agreed to the arrangement, and that in consequence thereof the deed from Lylburn was executed to Sackett accordingly.

The defendant Willard further alleges and avers, that he never meant to rely on the personal responsibility

Sackett for the payment of the \$3000, but that it was understood by Lylburn, Sackett and himself, that the property conveyed to Sackett was to be held by him in trust for the defendant Willard, for the purpose of raising the said \$3000 for him by a sale or mortgage of the whole or part of the estate. He further states that he paid the whole consideration for the said property so conveyed to Sackett in Virginia lands, according to the terms of the arrangement with Lylburn, 540 acres of land in Munro county, in the state of Virginia, being conveyed by him to Lylburn on the 20th March, 1818, and a covenant or instrument given for the conveyance of the remaining 5360 acres, to be selected out of 200,000 acres owned by him in that state, within twelve months from that date, which instrument was assigned by Lylburn to Amos Cowley, and by him to David French, to whom he, the defendant Willard, on the 24th February, 1818, conveyed the lands therein mentioned.

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*In the instrument or covenant for the conveyance of the 5360 acres of the 6000 acres of land to Lylburn, which bears date and was executed on the 20th March, 1817, it was stated by way of recital that the defendant Willard was owner of 200,000 acres of land in the different counties in Virginia, and that John Lylburn had purchased of said lands 5360 acres to be selected within twelve months from the date of the said instrument; that John Lylburn on the 19th March, 1817, conveyed one moiety of the estate derived from his father to Sackett for the consideration of \$3000, which was to be paid by Sackett to the defendant Willard as soon as the same was received from the said estate, as a full satisfaction for the lands so purchased by Lylburn of Willard.

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On the same 20th March, 1817, an order or instrument in writing was executed and given by Lylburn under his hand and seal, directed to Sackett, thereby requiring him to pay over to Willard \$3000 when he received it from the proceeds of the estate of Lylburn devised to him by

1830. his father, it being the value he placed upon the said
 White tate, and all he was to give Willard for 6000 acres of
 v. in the state of Virginia purchased of him ; and in
 Carpenter. directing Sackett, that in case the whole estate vested
 him (Sackett) upon final settlement, should amount to
 sum over the \$3000, he (Sackett) was to retain the
 as a compensation for the trouble and expense he had
 been at in settling the said estate and negotiating the
 change of property between Willard and himself.
 In this order or instrument a written acceptance was made
 and signed by Sackett, and the order with the acceptance
 thus endorsed thereon was delivered to Willard and
 accepted by him.

The defendant Willard states in his answer that
 the arrangement was completed, he applied to Sackett
 for security for the \$3000 ; that Sackett told him he
 could raise the money by a mortgage of the interest assigned
 him, and would pay the amount as soon as it should
 be raised, and would pay \$1500 the next day ; and that
 the defendant, thereupon took the order and relied
 on it and on the assurances of Sackett without security.

[*227] *He further states that on the 10th January, 1818
 apprehending that Sackett intended to defraud him of
 the amount due to him out of the estate by making a con-
 veyance thereof, he, the defendant, filed a bill against
 him and obtained an injunction to restrain him from making
 any disposition of the property to his (Willard's) injury
 and that on the 2d April the suit was settled, Sackett
 having consented to secure the defendant by the con-
 veyance of the estate to Sylvanus Miller in trust for his
 life ; and which conveyance was made on the first of
 the month, and satisfied the defendant.

But the defendant contends, moreover, that the
 principal and interest originally conveyed by Lylburn to Sac-
 kett, though the deed was absolute in its terms, was vested
 in Sackett, and held by him as a trustee, in trust for the
 defendant Willard, to the extent of the said sum of \$3000.

which was to be raised for him thereby ; and he insists that the complainant was chargeable with notice of the trust, and bound by it. Sackett has been examined as a witness, and denies the trust. He testifies in clear and positive terms, that the deed was executed to him for his own benefit ; and that Willard had no interest in the property. If full credit could be given to this statement it would be conclusive ; but the witness is indistinct in his recollections, and his answers on his cross-examinations are unsatisfactory. I dare not trust implicitly to his testimony ; yet I am not to disregard his deposition, but to view it in connection with the other proofs in the cause, and look to the whole of the evidence taken together for the character of the transaction.

The first branch of the complainant's title is his purchase from the assignees of Hart. The defence taken by the defendant against that claim is, that the trust deed from Sackett to Miller under which the title of Hart was derived, by the express terms of it, gives a preference and priority to his claim, and necessarily postpones that of the complainant. The conveyance of Sackett and wife to Miller, is of all their right, title, interest, claim and demand in law and equity, of, in and to the estate real and personal, whereof Robert Lylburn, deceased, died seized or possessed, and of, in and to the rents, income, interests and profits of the same which had arisen or accrued since the decease of Lylburn, or might thereafter arise or accrue from the same ; and the trusts of that deed are, that Miller, the trustee, after converting the trust estate into money, and defraying the charges of the trust, should pay the defendant Willard three thousand dollars with interest from the date of the deed in the first place, and then to pay the demands of the creditors named in a schedule annexed to the deed rateably, according to the amount of their demands. And if that conveyance was operative, and the trust for the benefit of Willard was effectual, I do not see how his interest in the estate can

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be defeated or impaired by any subsequent act of Sackett, or how the assignment afterwards made by Sackett to Hart, the benefit of which is now vested in the complainant, can supersede that prior conveyance to Miller, or entitle the complainant to any portion of the estate of Lylburn until the defendant Willard is first paid. Indeed Sackett obviously intended that the assignment to Hart should operate upon the surplus only of the estate after the trust in favor of Willard should be first satisfied; for the deed recites the trusts vested in Miller, and purports to convey to Hart the shares and proportions of the trust property which the three creditors mentioned in it would have been entitled to receive if they had conformed to the provision of the trust deed and executed the release and discharge required by the proviso or condition it contained. Sackett could not consistently with his conveyance to Miller convey to Hart any further or greater interest than the surplus and residue of the trust premises after the payment of the \$3000 and interest to Willard thereout. The question of notice of the trust vested in Miller for Willard could not arise, for the right and interest of Sackett in the estate to the extent of the appropriation in favor of Willard was vested in Miller, the trustee, before the conveyance to Hart, and the trust for the defendant Willard was declared and appeared on the face of the deed to Miller. Sackett therefore had no power to convey that interest to Hart, and Hart could derive no title to it from him.

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It might perhaps be questionable on the authority of some recent decisions whether the trust deed to Miller was not in its *inception, and at the time of the subsequent conveyance to Hart, fraudulent and void as against the creditors of Sackett by reason of the proviso or condition it contained requiring the creditors to execute to Miller, the trustee, a release and discharge of their demands against Sackett, the debtor, to entitle them to the benefit of the trust and provision in their favor; and which pro-

vision, in case of their neglect or refusal to comply with the condition, was to enure to the benefit of Sackett. But that question was not raised; and as the objection to the deed on that ground was open to creditors only, and the trusts were effectual between the parties themselves, the complainant in his character of purchaser under Sackett could not perhaps avail himself of that exception to its validity; and if he as assignee of a judgment creditor had objected to that feature of the arrangement, it would have deserved to be well considered how far the principle is sound by which the whole deed is vitiated by one invalid trust, or whether, when the several trusts are distinct and separate from each other, and some of them are illegal, but others are meritorious and free from taint or pollution, the latter may not be upheld, while the former are suppressed; and the conveyance of the estate to the trustee be held valid for the support of the meritorious and beneficial trusts in favor of the honest cestuis que trust, but inoperative and void as a provision for the illegal purposes and fraudulent views it attempts to subserve. My judgment must be borne down by the force and weight of authority before I can attach to statute provisions a harsher operation or more unbending severity than to common law principles; or deny to legislative enactments the liberal, benign and equitable construction which will give to them the attributes of a nursing mother, equally with the rules and principles of the common law. But whatever might be the effect of the illegal provisions of the deed under other circumstances, the complainant in his character of purchaser, in which light we are now considering him, has not made a case by his bill and proofs in the cause entitling him to avoid it as inoperative and void; and has not put his objection to it upon that ground. He asks, under this branch of his title, the interest conveyed to *Hart by the assignment of Sackett to him. To that extent he is entitled; and as the deed which grants it expressly grants what was intended for

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the therein specified creditors, and which by their force of it reverted to Sackett; and as the trust deed Miller which created that interest defined it to be a rateable dividend of the surplus and residue of the trust estate after the payment of \$3000 and interest out of it. Willard in the first instance, the complainant can claim under his title derived from Hart's assignees no more than his \$4000, after the prior appropriation of \$3000 and interest to the defendant Willard shall be first fully satisfied.

But his claim under the title derived from the purchase made by him under the judgment against Sackett in favor of Farrelly, and from the assignment of that judgment to him, is alleged to be more comprehensive, and exposes none of the objections which apply to his title as a purchaser under Hart's assignees. That judgment was docketed on the 25th October, 1817, which was nearly six months prior to the conveyance from Sackett to Miller. It consequently bound all the real estate of Sackett, and was a subsisting lien upon his share, or one sixth part of the lands and tenements formerly of Lylburn, if the estate was vested absolutely in him in his own right, at the time of the conveyance of that interest by Sackett to Miller. That lien was afterwards enforced by an execution on the judgment, and a sale thereunder by the sheriff of the city and county of New York, of all the right and interest of Sackett on the 25th October, 1817, when the judgment was docketed, or at any time afterwards, in the estate of Robert Lylburn, deceased, at the time of his death, in the city of New York. At this sale, the regularity of which is not impeached, the complainant White became the purchaser of the interest thus sold. He claimed also to be the proprietor of the judgment by purchase and a regular assignment of it to him prior to the sale, and if these titles are established by proof, they are prima facie sufficient, and will, unless repelled by other proof, entitle him to a decree for the portion of the estate claimed.

the proceeds of the estate in question, which they ostensibly cover, or, at least, to the amount due before the judgment.

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Carpenter.

*But his proof of title to the judgment is said to be defective. No assignment of the judgment is produced, nor do I find any proof of the loss of it or of a search for it. But the defendant, in his answer, states, that the complainant, as he the defendant has been informed by the attorney of Farrelly, and verily believes, purchased the judgment on or about the 27th day of April, 1822, and took an assignment thereof, drawn by said attorney, for the consideration of \$200, besides the costs of suit. This statement would seem to be a sufficient admission of the ownership of the judgment, if the complainant had not gone into proof of it; but he has made it the subject of proof. David Codwise, the attorney for Farrelly, the judgment creditor, has been produced as a witness to prove the assignment of the judgment by Farrelly to the complainant. He testifies that an assignment of it was executed by Farrelly to the complainant, in his presence, in the month of April, 1822, and prior to the 27th, and, as he thinks, about the 16th day of that month; that the consideration for the assignment was \$200, the balance remaining due of the debt, and \$128.72, also remaining due thereon for costs and fees, amounting in all to \$328.72, which was paid to him, the witness, by the complainant at the time of the delivery of the deed of assignment to him, and was remitted by him the witness to Farrelly the judgment creditor, or accounted for to him; and that the said sum of \$328.72 was due upon the judgment at the time of the assignment of it to the complainant.

The fact of the assignment is further confirmed by the written consent of Sackett the debtor to the assignee to issue execution upon it, which is in proof in the cause. This consent bears date the 3d May, 1822, and purports that the judgment having been assigned, he (Sackett)

1830. thereby consents that execution thereon issue a
 White cretion of the assignee without the expense of
 v. proceedings to revive the same. This evidence
 Carpenter. doubt of the fact of the assignment of the judgment
 the complainant, but it shows that the assignment
 by deed, and that deed not being produced,
 proof of the loss of it given, or that any search
 made for it, the parol testimony adduced to
 [*232] might not of itself, if it stood alone, and the objection
 it had been properly taken, be competent or sufficient
 to show the existence and contents of the assignment.

But the introduction of that evidence does not
 show the fact of the assignment, nor disclose any circumstance
 to raise a suspicion against either the fairness of the
 transaction or the sufficiency of the assignment of
 the interest in the judgment; and I do not see, then,
 why it does not leave the force and effect of the admission
 of the defendant in his answer unimpaired; and that
 admission supplies the deficiency of other proof
 that would follow, then, that the complainant is to be
 considered as the owner of the judgment. But it is further
 contended that whether the complainant was the creditor
 of the judgment or not, the purchase by him of the
 judgment and interest sold by the sheriff by virtue of the execution
 issued upon it, is equally available to him.

The fact of the sale is established by the certificate
 of the sheriff, which shows that all the right, title and
 interest of Sackett in the real estate therein specified, and
 which appears to be all the real estate in the city of New
 York whereof Robert Lylburn, deceased, is mentioned in the
 pleadings to have died seized, was sold by the sheriff
 by virtue of the said execution on the 12th July, 1830,
 to the complainant, and that he was entitled to a deed
 of the same. This sale by the sheriff, under the execution
 of the Farrelly judgment, and the purchase by the
 complainant under it, are admitted by the answer.

The objections therefore taken by the defendant

argument to the sufficiency of the complainant's proof of the assignment of the judgment to him, and to the evidence of title to a deed by the sheriff's sale, cannot in my judgment prevail.

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But it is contended on the merits of the defence that the judgment never was a lien on the real estate conveyed by Lylburn to Sackett, and if that position can be sustained, the title set up by the complainant under that judgment must fail.

In support of this defence, the defendant alleges that the estate conveyed to Sackett was acquired by him as the agent of the defendant in exchange for lands in the state of *Virginia, belonging to him the defendant, and agreed to be exchanged by him with Lylburn for the moiety of his share and interest of and in his deceased father's estate; and that the conveyance of the interest agreed to be taken of Lylburn in exchange for the lands of the defendant agreed to be conveyed to him therefor, was made to Sackett solely for the purpose of enabling him, as the agent of the defendant, to raise the sum of \$3000 by the sale or mortgage thereof for the use of the defendant, and vested the title in him as trustee for Willard, and not in his own right. The defendant further insists upon an interest in the premises as having resulted in his favor by implication of law from the payment of the consideration of the purchase. He avers that Sackett never gave any consideration for the conveyance of the estate and interest to him, and that Lylburn never received any other consideration therefor than the lands conveyed and contracted to be conveyed to him by the defendant; and he insists that by reason of such payment of the consideration by him, the estate conveyed by Lylburn to Sackett was taken and held by Sackett in trust for him and for the payment to him of the said \$3000.

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The deed from Lylburn to Sackett was an absolute conveyance of the estate to him in fee in the usual form.

1830. There was no trust expressed, and there was no
 White or indication of a trust upon the face of the con-
 v. But it is contended that the papers executed
 Carpenter. parties to the transaction on the 20th March, 1
 day after the date of the deed, show the nature
 of the transaction and establish the trust. The written
 instruments consist of, first, the covenant of the defend-
 ant for the conveyance of the 5360 acres of
 land to Lylburn, in completion of the arrangement
 between them for the exchange of Virginia land
 moiety of the younger Lylburn's share and in
 the elder Lylburn's estate; and secondly, of the
 Lylburn upon Sackett for the \$3000 in favor of
 the defendant Willard, and Sackett's acceptance of the
 same. These written evidences, and particularly the
 Lylburn upon Sackett in favor of the defendant
 for the \$3000, to which the defendant Willard is
 [*234] self *privy if not a party by his acceptance of the
 same, show that the consideration Lylburn was to give
 6000 acres of Virginia land was the sum of \$3000;
 that the value set by Lylburn upon the moiety
 share and interest of and in the estate of his father
 deducting the disbursements and charges of settling
 the estate and effecting an exchange interest in the
 Virginia land, was \$3000; and that the same was
 conveyed by him to Sackett upon the payment of
 Sackett to pay to Willard the \$3000 he was to receive
 for the 6000 acres of land he was to convey to
 Lylburn; and that Sackett was to retain and convey
 to accept and take the excess and surplus of the
 land and interest so conveyed to him, if upon the final
 settlement of the estate there should be any surplus
 over the \$3000, for his trouble and expense in settling
 the estate and negotiating for Lylburn the sale of his
 interest in his father's estate for the Virginia land
 of Willard. The estate and interest then was the subject of
 concurrent agreement of all parties to the arrangement.

to be vested in Sackett absolutely, and he was to assume and pay to Willard the \$3000 payable to him; and for raising that sum, the property vested in Sackett was contemplated as a resource to him. A charge upon the estate would have been the best security to Willard for the faithful application of the proceeds of it by Sackett; and Willard shows by his own statements that he was fully sensible at the time of the importance of that species of security to him, but his fears of jeopardizing the success of Sackett's operations for raising the money upon the estate seems to have deterred him from the precautionary measure of charging it with a trust or lien for his own safety. Sackett professed an entire confidence in his ability to raise the money if the estate was vested absolutely in him; and Willard, trusting to these professions and impatient to realize the money his occasions required, yielded to the suggestion of Sackett; and for the purpose of facilitating his operation, was induced to repose himself upon the integrity of Sackett, and to intrust him with the ownership and unrestricted disposal of the estate. It would have been incompatible with this plan of operation to encumber the property with a trust; *and, besides, as the money was to be raised immediately, and the whole operation was expected to be completed within a very short period of time, it was the less necessary to take any precaution to guard the power intrusted to Sackett from abuse. These probably were the causes of the confidence reposed by Willard in Sackett. It was natural and almost a thing of necessity that Willard should, under such circumstances, relax his vigilance and dispense with the lien which an express trust would give him upon the property, and allow it to be vested in Sackett as the absolute owner in order to facilitate the sale or pledge of it by him to raise the money; and this course of proceeding was the more proper, as Sackett had an interest in the estate conveyed to him, and was to retain the surplus, after providing for

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1890. and paying the \$3000, to his own use. It was in conformity to these views that the conveyance to Sackett was absolute, and that the order of Lylburn on him and his acceptance of that order for \$3000 was given to Willard and taken by him in lieu of a trust or security upon the property itself. These were Willard's own views of the subject; for he admits in his answer that his first impression was that the property to be obtained from Lylburn should be conveyed to himself and not to Sackett; but that upon the representations of Sackett, and his promise and assurance that the money could and should be immediately raised by him upon or out of the property if vested in him, and should be paid by him to the defendant Willard, he (Willard) relying upon these promises and assurances of Sackett, consented to the conveyance of the premises to Sackett. He further states that his impression was that he ought to have some security for the \$3000 when he executed the conveyance or covenant to convey his land to Lylburn, and that he mentioned that impression to Sackett, but that Sackett replied that it was not worth while to multiply papers; that he (Sackett) had the promise of the \$3000 on a mortgage of the property, and the same should be immediately paid to the defendant Willard, and that he should in any event receive \$1500 the next day or the day after; and that in consequence of those assurances, and relying upon them, he (Willard) received *the order and acceptance from Lylburn and Sackett. Thus, we have his own acknowledgment that he forbore the further pressure of his claim to the security, and rested upon the faith of Sackett's engagements. He avers, indeed, that he had no intention of trusting to the personal responsibility of Sackett; and in support of that allegation, it is urged that the arrangement between the parties, and the engagement of Sackett, appears upon the face of the order to refer to the one sixth of the Lylburn estate vested in Sackett by the deed from Lylburn as the source or means

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by which the order was to be met. But the answer is that no trust, lien or security upon the estate was created for the defendant. The property was conveyed to Sackett absolutely, and vested in him in his own right; and his acceptance was taken to bind him to apply the \$3000 of the proceeds of the premises when sold or mortgaged, to the payment of the order in favor of Willard. The security of Willard that the means thus furnished to Sackett would be applied to the raising and paying to him the \$3000 according to the terms of the order were, the promises and assurances of Sackett, the confidence reposed in his integrity by Willard, and the powerful motives he must, under such circumstances, have been supposed to have to be faithful to his engagements.

The result of the whole of the evidence would seem to be, that the consideration Willard was to receive for the 6000 acres he agreed to convey to Lylburn was the sum of \$3000 in money, and not the moiety of Lylburn's share of his father's estate, which was valued by him at \$3000 to Sackett, who, in consideration thereof, was to pay the \$3000 when received out of the property to Willard, and to have the surplus value of the property conveyed to him for his own compensation. Sackett did not, by this arrangement, become the trustee of the property for Willard; his engagement was not to hold it in trust, but to take it in his own right absolutely, and to raise out of it or upon it the sum of \$3000, and pay the same over to Willard. The power of Sackett to dispose of the property as the absolute owner of it was unrestricted; and a personal confidence was placed in his fidelity in applying the proceeds according to his engagement. The only feature of the arrangement which wears the semblance of a trust is the reference to the property as the means of raising the \$3000 to be paid by Sackett to Willard. This circumstance might raise an equity as between Sackett and Willard, in favor of Willard, if no intervening lien would be disturbed, nor any interest of any third party affected

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by the omission to have the estate sold for the purpose of raising the money, in case the payment of it should be unreasonably delayed by Sackett; but it is not sufficient to impress the character of a trust upon the property. The obligation of Sackett to raise and pay the \$3000 which Willard was a personal engagement; the property conveyed to him by Lylburn was the means by which the money was expected to raise it. But the money was not charged upon the estate, nor was there any trust created by deed to Sackett, or declared by the order and acceptance to which he was a party, whereby the property could be affected. He was the absolute owner of the estate and had the unqualified right to sell it, and a purchaser was not, I apprehend, bound to see to the application of the purchase money.

The order and acceptance for the payment of the \$3000 and the covenant of Willard, both of which were executed on the 20th of March, are the only instruments of writing in which the trust could have been expressed, and I am satisfied that neither of those documents contained any binding or effectual declaration or expression of any trust; and if the defendant is correct in the representation he makes in his answer, that it was understood by Lylburn, Sackett, and himself that the property conveyed to Sackett was to be held by him (Sackett) in trust for Willard (Willard) for the purpose of paying him by a sale or mortgage of the whole or part thereof, the said \$3000 the alleged trust was by parol and never reduced to writing or expressed or declared in the form required by law to make it a valid or effectual trust to bind the grantor or to charge or affect the estate.

But it is contended that the payment by Willard of the consideration for the purchase of the estate conveyed to Sackett created a resulting trust of the estate to him.

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*The rule that a trust will result to him who pays the consideration for the estate, where the title is taken in the name of another, is well established; and the reason

it is too obvious to need illustration. It is equally true, that the statute of frauds does not affect such a trust, for it arises by operation of law, and is expressly excepted by the statute from its operation; and it is equally clear that parol evidence is admissible to establish such a trust by showing the fact of the payment of the consideration money by the cestui que trust. (*Jackson v. Steenberg*, 1 John. Ca. 153. *Foots v. Colvin*, 3 John. R. 216. *Willis v. Willis*, 2 Atk. R. 71. *Botford v. Brown*, 2 John. C. R. 405.)

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The question is whether the facts in this case sufficiently show a resulting trust in these premises in favor of Willard.

A resulting trust arises by implication of law, and the operation of it is to vest the estate itself in the party to whom the trust results. The principle is, that the estate belongs to the party who advances the money out of his own funds and on his own account to pay for it; and the nominal grantee, who receives the title without paying or incurring any liability to pay any part of the consideration money, is looked upon and in truth is the mere conduit pipe or channel through which the estate and the title and interest in it pass from the grantor to the real purchaser who pays the consideration for it. It follows, as a necessary consequence, that the trust must arise, if at all, at the time of the conveyance, and that the money or other consideration for the deed, which is the foundation of the trust, must be then paid or secured to be paid. So far has this principle been carried, that courts of law have held that such interests are saleable by execution against the cestui que trust, and that the right of possession and legal estate may be recovered in an action of ejectment or writ of right against the trustee, on the ground that the trust is executed by the statute of uses, and the estate itself vested in the cestui que trust.

The trust, then, which results to the purchaser by operation of law must be a pure, unmixed trust of the own-

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ership and title of the land or estate itself, and not an interest in the proceeds of the land, nor a lien upon it as a security for an *advance or other demand, nor an equity or right to a sum of money to be raised out of the land or upon the security of it. These rights are the subjects of the contracts or agreements of parties, and may form the substance of express trusts; but they require for their subsistence that the title and legal estate of the premises which yield the aliment that sustains them, should reside, not nominally, but potentially in the trustee. They are not fit objects therefore for implied trusts; they are too complex and partake too much of the nature of contracts to belong to the class of pure and simple trusts, the sole operation of which is to vest the estate in the actual purchaser in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those for whose benefit the legal owner may be under a moral obligation to hold or apply it.

In the case now under consideration the defendant Willard does not claim to have been originally entitled to the estate conveyed to Sackett, but to the sum of \$3000, to be raised by Sackett out of that estate or upon the credit and security of it. This equity as claimed by him, is, by his own showing, to have that sum of money raised by the sale or mortgage of the property, or a competent portion of it, and the trust, if any, must attach to Sackett, and bind him and the estate thus vested in him, to hold and apply that estate for the security and payment of that sum to Willard as cestui que trust in the premises, and not to bind him to convey the estate itself to Willard, or to hold for him and subject to his disposition and control. This avowal by the defendant of the nature of the interest he claims in the property is decisive against the trust supposed to result from the payment of the consideration for the purchase of the estate.

It was also contended that there was no resulting trust, because Willard did not acquire by the arrangement a

right to the whole estate conveyed to Sackett, but an interest to the amount of \$3000 only, and that the residue was the absolute property of Sackett the grantee; and the rule was contended to be that a trust could not arise by implication in a portion only of the estate from the payment of part of the purchase money. To this it was answered, that a different *rule prevailed in *Wray v. Steele*, where a trust of the one third part of the premises was held to result to the party who had advanced one third part of the purchase money. The principle of that case remains unshaken in England, and the same principle has been acted upon in our own courts. But though there may be a trust of a part only of the estate by implication of law, it must be of an aliquot part of the whole interest in the property. The cestui que trust to whom the trust results must become, by the operation of law upon the estate, a tenant in common with the grantee of the whole interest vested in him by the grant. There can be no resulting trust of the whole estate to a given extent of the value of it, leaving the residuum, if any, of the value to the grantee; nor can an estate result to the party who pays the consideration as a pledge or security for the money so paid, and on the re-payment to return to and vest in the nominal grantee. Those interests may be created or protected and secured by mortgage of the estate, by express trust, or by liens upon it. But when an estate results by implication of law, the title and legal estate of the whole, or of some aliquot part of the whole, must vest in the party to whom it results, and in that sense the cases are to be understood which decide that there can be no resulting trust in favor of one who pays a part only of the consideration money. This was the point of the decision of Lord Hardwicke in the case of *Cross v. Norton*, (2 Atk. 74.) In that case the elder Norton, the lessee, who was the last life of a lease, agreed to surrender it on the engagement of the lessor to grant a new lease for three lives, namely, the life of old Norton, of Col.

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Norton, and of an infant son of Col. Norton, for the consideration or price of \$1500. Col. Norton paid the consideration, but the legal estate in the new lease was granted to old Norton and his heirs for the lives of himself and of Col. Norton and of his son; old Norton died the day after the new lease was given, executed a declaration of the trusts of the lease in favor of Col. Norton and his son after his decease; Col. Norton, after the death of old Norton, supposing the estate to be his, contracted to renew the same to Cross; and the question was, whether the leasehold estate belonged to old Norton in whose legal estate was vested, or resulted by implication to Col. Norton, who paid the price for the renewal. Chancellor Hardwicke observed that old Norton had the sole interest in the estate for his life, and the right to renew which was a valuable interest, and formed part of the consideration of the new lease; that the whole of the purchase was not paid by Col. Norton, and therefore there was no resulting trust for him; and on those grounds he held, that he must determine upon an express declaration of trust by old Norton who had the legal estate and valuable share in the new lease at the time it was purchased, and consequently the only person who had the right to declare the trust, and that there could be no pretence for an implied trust, by operation of law.

The grounds of the decision of Lord Hardwicke were that Lord Eldon was right in saying that this case was misconceived when it was cited as an authority for the proposition that a trust could not result from the payment of part of the purchase money. The principle is, that the consideration for the whole estate, or for the moiety, third or some other definite part of the whole, money paid to be the foundation of a resulting trust; and the contribution or payment of a sum of money given for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law.

law for him who pays it; and the reason of the distinction obviously is, that neither the entire interest in the whole estate, nor in any given part of it, could result from such a payment to the party who makes it without injustice to the grantee by whom the residue of the consideration is contributed.

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Why does not this principle govern the case before me? The \$3000 was not the whole consideration for the purchase of the estate conveyed to Sackett. It was the consideration agreed to be given for the 6000 acres of land purchased by Lylburn of Willard, and it was the value set by Lylburn on the estate conveyed to Sackett for enabling him to raise the sum to be paid to Willard over and above his expenses and compensation for affecting the exchange and raising the money. *The compensation to Sackett made part of the consideration for the estate conveyed to him; and when we see that estate valued by the parties in the schedule annexed to the deed to Miller at upwards of \$9000, we must intend that Sackett had a valuable share in it at the time it was purchased; and the legal estate being in him, and the payment to Willard of \$3000 of the purchase money not constituting the whole consideration for the purchase, and not being paid as the consideration for any aliquot part of it, and no rule being given by which any share of the estate could be designated as accruing to him from that payment, there could be no ground for any implied trust to him by operation of law.

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But it is contended that the order upon Sackett and his acceptance of it, supposing them not to amount to a declaration of trust, nevertheless created an equity in favor of Willard, which gave him a lien upon the proceeds of the estate to the amount of the \$3000 he was to receive, and bound the land to him to the amount of his security.

The order was upon Sackett: but the avails of the property vested in him by the conveyance from Lylburn was the fund out of which the money was to be paid, and the

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payment was by the terms of the order deferred until sale or other disposition of the estate. The claim of Willard by virtue of the order was upon the fund or proceeds of the estate, and not upon the estate itself; and the obligation of Sackett was to apply the avails of the property when received by him to the satisfaction of the order accepted. No time was limited for the pledge or sale of the estate to raise the money; and if the sum drawn had been paid or secured to Willard, all obligation to Sackett would have ceased. The acceptance was a personal engagement of Sackett to pay the \$3000 to Willard when that sum should be received by him from the avails of the property, and whenever the property should be disposed of he would be liable to Willard for the avails to that amount; and if he suffered the estate to be sold to satisfy his own debts, or sold it at an under value, he would have been himself answerable for the true value to the amount of the order; and any causeless and unreasonable delay in the sale or disposition of the premises might perhaps have produced the same effect as to his liability; but the order and acceptance created no direct charge or lien upon the property, and clothed it with no trust for payment of the money which the acceptance bound Sackett to pay to Willard.

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It was strongly pressed upon me that the order was exclusively upon the proceeds of the estate vested in Sackett, and that the estate was conveyed to him as a provision to enable him to meet the payment, and that his acceptance was intended to bind the fund only, and did not bind him personally beyond the amount he should receive from the property; and on that ground it was contended that Willard had an equitable claim upon the estate out of which the fund was to be raised for his benefit, which entitled him to cause it to be appropriated to that object. But it may well be doubted whether the order was upon the fund solely, or was not upon Sackett personally, qualified with the condition that the amount drawn for should not

come payable or be demanded of him until the sale or mortgage of the estate should be effected by him, to enable him to meet the demand. The documents, taken in connection with the pleadings and proofs, manifestly show that the purchases and sales were negotiated by Sackett, who acted for both parties and ultimately became himself the purchaser under the arrangement finally agreed upon. It appears that Willard wished to raise \$3000, and was willing to sell and offered for sale 6000 acres of Virginia land for that purpose; and that Lylburn had authorized Sackett to sell his remaining interest in his father's estate, being one undivided sixth part of that estate, for the same sum; that Lylburn was willing to take the Virginia lands offered by Willard for sale in payment for the interest in his father's estate, which he wished to dispose of, but was unable to pay money for the land; and that the exigencies of Willard requiring money, and not permitting him to accept an undivided interest in an unsettled estate in payment for his land, Sackett, who estimated the interest of Lylburn in his father's estate at a much higher value than the \$3000 Lylburn was willing to take for it, proposed and agreed to *become himself the purchaser of it, and to assume and pay the \$3000 which Willard was to receive for the lands to be conveyed by him to Lylburn; and this arrangement meeting the views of all the parties, the deed to Sackett was executed by Lylburn, and the order of Lylburn upon Sackett for the \$3000 in favor of Willard was accepted by Sackett to carry the same into effect.

In conformity with that arrangement, Lylburn, by his order on Sackett, directed him to pay over the \$3000 to Willard out of the estate conveyed to him, and conceded that if the estate should produce more than the \$3000, Sackett was to retain the same as a compensation for his trouble and expense in settling the estate and negotiating the exchange; and in the same spirit the covenant of Willard with Lylburn of the same date refers to the purchase by Lylburn of Willard of the preceding day; and

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the conveyance by Lylburn of his one sixth part of his father's estate to Sackett for the consideration of \$3000 and declares that the said \$3000 was to be paid to him (Willard) as soon as the same might be received from the estate so conveyed to Sackett, as a full consideration for the land purchased of him (Willard) by him as before stated. Did not these parties then ascribe the value of the moiety of Lylburn's interest in his father's estate to be at least \$3000? and was not that sum agreed upon as the minimum value of that interest to the purchaser, and as the basis of the exchange? and did Sackett, by accepting the order with full knowledge of the facts, assent to that valuation as the price he was to pay for the property at all events, and take the property conveyed to him on those terms? If that is the just construction of the order, taken in connection with the facts as it appears in evidence, Sackett must be held to have assumed and agreed to pay the \$3000 for the property to Willard at all events; and the reference to the property conveyed to him as the means of payment was for his accommodation solely, to enable him to avail himself of that resource to fulfil his engagements, and deferring the fulfilment of that engagement until those means could be made available. In the transaction, the only equity Willard could have in reference to the estate conveyed to Sackett, was his interest in expediting a sale or disposition of the estate which was to entitle him to the payment of the order in his favor. But suppose the order should be applied solely to the fund, and not to bind Sackett personally beyond the amount he should receive from the property; how could the acceptance of the order create a charge or lien on the estate vested in Sackett?

The cases cited on this point by the counsel for the plaintiff support the position that an order or bill drawn upon a fund under such circumstances, and for which the drawer is not personally liable beyond the

the fund, amounts to an appropriation or assignment of so much of that fund in favor of the drawee which will prevail against the general assignees; and on that principle it has been held that an order upon the purchaser of real estate by the vendor for the payment of a given sum out of the purchase money has been held to amount to the transfer of so much of the purchase money to the party in whose favor the order is given. (1 Ves. jun. 282.) But none of the cases countenance the opinion that such an order will be a charge or lien upon the estate conveyed to the purchaser, or entitle the holder to claim satisfaction out of the land. It is the debt contracted by the purchaser for the purchase of the land upon which the order operates, and the appropriation or assignment it effects is of so much of that debt for the purchase money in the hands of the purchaser, and not of an interest in the estate he purchased. On that principle, this order was an assignment or appropriation to Willard of \$3000 of the purchase money for the interest conveyed by Lylburn to Sackett; and the rights of Willard under that assignment would prevail against the claim of the general assignees of Sackett, under the laws relative to bankrupts or insolvent debtors. But could such an order, in its operation as an assignment of the purchase money, charge the land or create a lien upon the estate vested in the purchaser? I can discover no principle of equity upon which such a charge or lien can be supported. It may be said that equity gives to the vendor a lien upon the estate he sells for the unpaid *purchase money, and that the lien is not extinguished or discharged by superadding to it the personal obligation of the vendee. Whether those doctrines of the English courts of equity obtain with us, and if so to what extent, seems an unsettled question. But without investigating that point, and taking it for granted that the rule of this court is the same as that of the English court of chancery, that equity cannot be invoked into this cause, for the rule does not apply to cases where collateral secu-

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rity is taken or the mode of payment is regulated by a special agreement, and it may be at least questionable how far the lien is transferable to the assignee of the purchase money. How then can the rule be applicable to this case? Must not the arrangement for the payment of the purchase money by Sackett, and the order upon him in favor of Willard for the \$3000 and his acceptance of that order, supersede the equitable lien, which the law, in the absence of the special agreement of the parties, might raise in favor of the vendor?

Lylburn, the vendor, has, by his order upon Sackett the purchaser, assigned \$3000 of the purchase money to Willard, and Sackett is bound by his acceptance of the order to pay over that amount to him. Lylburn, therefore, who has parted with his title to the purchase money, can have no lien for it upon the estate; and Willard, who has taken the order upon Sackett and Sackett's acceptance of that order for the amount he is to receive without requiring any express collateral security upon the estate for the payment of it, must take his remedy, if put to a remedy, for the recovery of his demand upon that order and acceptance, and unless the terms or legal effect of that title authorize or entitle him to a recourse to the estate conveyed by Lylburn to Sackett, he can have none. The equitable rights conferred upon him by that order and acceptance, clearly entitled him to the aid of the court for holding Sackett to the spirit of his obligation, and for enforcing the full performance of his engagement. He might be compelled to pay the amount of the order he had accepted after the lapse of a reasonable time had been allowed him to convert the estate into money, or to raise the necessary funds upon it by mortgage; and possibly, as

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between him and Willard, the immediate parties to the order, the court, while the estate remained in his hands unsold and free from incumbrances, might decree him to satisfy the order, or to bring the estate to sale for the purpose of raising the money for the payment of his

acceptance. But I do not apprehend that equity could carry the relief of the holder of the order and acceptance so far as to supersede or impair the interest of a purchaser or the lien of a judgment creditor in his favor; but that if a sale of the estate had been decreed to be made by Sackett for the satisfaction of the order, such sale must have been subject to the liens upon the estate created by prior judgments against Sackett, and the purchasers must have taken subject to those judgments.

The judgment of Farrelly was obtained in October, 1817, prior to the deed to Miller, and before the filing of the bill of Willard against Sackett for the payment of the order, or the sale of the estate for its satisfaction. The complainant purchased that judgment in April, 1822, and became the purchaser of the interest which Sackett had in the property, when the judgment was docketed, at the sheriff's sale under the execution upon that judgment in the month of July in that year; and if my conclusions are correct, that the estate was bound by no trust for Willard, and that he acquired no lien or specific charge upon it, either by contract or by implication of law, from the payment of the consideration in Virginia lands, but that his equitable rights under the order and acceptance, and the arrangements from which they emanated were such as I have before defined them to be, the result necessarily is, that the judgment of Farrelly which preceded the deed to Miller was a charge upon the estate at the time of that conveyance, and that the complainant, as the assignee of that judgment and a purchaser under it, is entitled to the benefit of the lien it created; and the defendant must be postponed to him or take subject to the charge of his incumbrance.

It was urged against the claims of the complainant that he had notice at the time of his purchase of the judgment, and of the property sold by execution under it, or was at those times chargeable with notice of the rights of

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Willard in the *premises, and must be held to have taken the interest he purchased subject to those rights.

If the views I have taken of the complainant's rights are correct, the question of notice is of no importance, unless the purchases of the complainant were fraudulent or collusive; and as the transactions are free from fraud or collusion, I might pass by that branch of the defence. But as the point was made and discussed at large by counsel, and as some of the considerations connected with it have important bearings upon the merits of the controversy, a brief review of that branch of the defence may be useful, as it will serve to illustrate and fortify the opinions already expressed upon the other points of the case.

Then, had the complainant notice of the rights and equity which the defendant now sets up and claims to have had in the premises? The deed from Lylburn to Sackett gave no intimation of any such equity, and it must be conceded that he could have had no notice, actual or constructive, of any such equitable right, or of the order and acceptance of the 20th March, 1817, from which those rights are supposed to result, unless he is chargeable with the knowledge of the contents of the deed from Sackett to Miller, or the allegations and charges in the bill filed by Willard against Sackett, or in that filed by Brewerton, Willard and others against Ann Lylburn and others, and unless those matters are held to amount to notice, or to be sufficient to put the complainant upon inquiry on the subject.

The deed from Sackett to Miller must have been known to the complainant, and he must be charged with knowledge of its contents; for the deed from the assignees of Hart to him recited that prior conveyance from Sackett to Miller, and refers to it as a link in the chain of title. He therefore knew of its existence and must have informed himself of its contents, or was bound to do so. But that deed did not recite or refer to the order and acceptance, nor acknowledge any subsisting trust or lien upon the

property for the satisfaction of the defendant's demand. Its recitals are, that Sackett was the owner in part, and held in trust in fee simple the one sixth part of the estate real and personal of Robert Lylburn, deceased, and which *one sixth part of said estate was estimated at \$9818.33; that Willard claimed to have a lien on said estate, and that he (Sackett) being indebted to the persons mentioned in the schedule annexed to the deed, was desirous, with the approbation and consent of Willard thereby testified, in order to provide for the payment and discharge of the said debts and claims as mentioned in the schedule, to convey the same to Miller; and after these recitals, he grants and conveys the same to Miller upon the trusts mentioned in the deed.

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Are these recitals notice of the rights the defendant claims to have had in the premises? The question of the sufficiency of notice is often embarrassing, and sometimes difficult of solution. But as a general rule to charge a purchaser, the notice must be such as explains itself by its own terms, or refers to some deed or circumstance which explains it or leads to its explanation. The recitals in this deed contain no express notice of any trust or equity in favor of Willard, nor do they refer to any transaction or matter from which any such trust or equity could be inferred. Nothing appears upon the face of the deed, or upon the conveyance from Lylburn under which Sackett held, to show any connection of Willard with the estate, or any ground upon which he could claim any interest in it, or lien upon it. So far from any recognition or admission of any trust of the estate, or equity affecting it for his benefit, his pretensions are expressly put, not upon an acknowledged right, but upon a claim made by him to a lien upon the property; and the fair import of the whole deed, taking the recitals and trusts in connection with each other, is, that the provision made for him by the trust of that conveyance was the only effectual security he had upon the property for his demand, and

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was intended to give him the lien which he claimed to have, but which had not before been admitted ; for if he already possessed an undisputed lien on the estate, the trust created for him by the deed would have been unnecessary, and his interest would have been better subserved by the recognition and confirmation of that prior *lien, and which his counsel in such case would have insisted upon instead of accepting an original trust, and thereby impliedly confessing that his previous claim to a lien was untenable, or that the benefit of it was waived and merged in the new security. The fair intendment from the terms of this deed is, that it was (and the complainant, if he perused it, had a right to presume that it was) the origin and source of the defendant's legitimate lien upon, and interest in the premises ; and if that deed was the foundation of the defendant's title, his right was subject to the prior judgment against Sackett the grantor.

But it is contended that the bill filed by Willard against Sackett, and that filed by Brewerton and others against Ann Lylburn and others, were notice to the complainant of the defendant's rights. The bill of Willard against Sackett was filed in January, 1818. It was never answered by Sackett, but the suit was settled in April of the same year ; the object of it being supposed to be accomplished by the trust created and vested in Miller for the benefit of Willard. That bill gave a succinct history of the transaction between Lylburn, Sackett and Willard, and put the claim of Willard, not on the ground of a resulting trust, nor on that of an express trust of the estate, but on the ground of an equitable lien or right, founded on the order and acceptance to have the money raised by means of the property ; and the prayer of it is that Sackett pay the money or that the estate be sold to raise it. But how could the complainant in this suit be chargeable with notice of the contents of that bill ? The suit was settled and terminated long before his purchase of the interest of the assignees of Hart or of the judgment of Farrelly

of Willard against Sackett was not at that time a
 ns in any just sense of that term. No reference
 sion is made to it in the deed from Sackett to
 nd no notice to this complainant, actual or con-
 , is shown of that bill or its contents. He was
 a party nor privy to the suit, and was as much
 le with knowledge of the contents of every bill
 s that. His rights cannot be affected by any
 the trust or equity of Willard which that bill
 ain. But the suit between Brewerton and others
 n Lylburn and others was pending and in active
 on at the time of the purchases of the complain-
 it appears that he had notice of that suit, and ap-
 be made a party to it.

ayer of the bill in that case was for an account
 rsonal estate and of the rents and profits of the
 e, and for a partition of the real estate of the elder
 and that one moiety of the share of John Lyl-
 hat real estate might be set off and conveyed to
 be disposed of by him according to the true in-
 meaning of the deed of trust to him from Sackett.
 was filed by Brewerton and others, claiming to
 ed to the moiety of the share of John Lylburn
 d been conveyed by him to Field and Sylvanus
 d Joseph Willard, and the several creditors of
 mentioned in his deed to Miller as cestui que
 aiming to be entitled to the other moiety of the

John Lylburn conveyed by him to Sackett,
 ann Lylburn the widow and the executors and
 of Robert Lylburn deceased ; and in stating the
 d interests of the alleged tenants in common of
 e, it states the one sixth part thereof which was
 l by John Lylburn to Sackett to be vested in
 trust for Willard and the other creditors named
 st deed to Miller according to the trusts of that
 l it simply deduces the title to that one sixth of
 e from John Lylburn to Sackett, and from Sack-

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ett to Miller. No allegation is made or notice take any trust, either express or implied, of the original veyance to Sackett for Willard, nor is any suggestio pretence made of any interest of Willard in the orig purchase of Sackett, or any lien upon the property veyed; nor is any mention made or notice taken of order of Lylburn upon Sackett in favor of Willard, o Sackett's acceptance of that order. But on the contr the complainants in that bill (and Willard was one them) expressly state that John Lylburn conveyed moiety of his share of the estate to Sackett for the sideration of \$3000, and that the same was afterwards indenture, reciting that he (Sackett) was the holder the and that Willard claimed to have *a lien thereon conve to Miller upon the trust in the deed mentioned, and Lylburn, at the times of the conveyances to Field Sackett, as an inducement to them to accept the con ances on the considerations therein mentioned, exhibi schedule of the estate showing it to be of the valu \$45,000 or upwards, and verbally represented that t the value thereof, and that Miller and those for w benefit the conveyance to him from Sackett was r had applied for an account and partition of the es thus admitting the property conveyed by Lylbur Sackett to have belonged to him, and the interest of lard in it to have been acquired by the deed to Miller stronger disavowal of the trust and equitable lien no up, and a clearer admission of Sackett as the sour Willard's title to the estate, could not be required by complainant in this suit, and he, of course, could no prejudiced by the knowledge he had of the conten that bill.

But another objection to his title arising from tha is that his purchases were made pending the suit, with notice to him of the pendency of it; and war that reason illegal and void. The rule is well settled a party whose right is drawn in question by suit can n

no effectual disposition of that right to a stranger during the continuance of the litigation, and before the right is established; and on this principle it is held that an interest acquired by a purchaser in the subject matter of a suit pending the suit, shall not avail against the plaintiff's title. This rule is essential to the purposes of justice, and its observance can alone render the suit effectual, or the judgment or decree of the court available to the prevailing party. It is a rule therefore which admits of but few exceptions, and ought not to be relaxed without controlling causes or upon urgent necessity.

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Hence it is that a party who takes under a grant from a defendant pending the suit, though he may acquire a legal title, and is not a party to the suit, must abide the decision of the cause, and will be concluded by the decree against his grantor, and be liable to be turned out of possession by process upon it. This was the principle of the case of *Garhel v. Durdin*, (2 Ball & Beatty, 167,) where the plaintiff had *been decreed the possession of lands, and upon a writ of injunction to put him in possession, a tenant who had, pending the suit, taken a lease of the defendant was dispossessed, and a writ of restitution being applied for was refused, on the ground that a tenant so taking a lease pending the cause acquires no effectual title against the complainant. The lord chancellor held that whoever dealt with the defendant for an interest in the property after a bill filed, has dealt with it subject to such decree as might eventually be pronounced. (3 Ves. 814. 11 id. 104. 2 Atk. 174.)

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In the case of *Murray v. Ballou*, (1 John. C. R. 566,) the purchase was made of Winter, a trustee, pending a suit against him for breach of trust, and for his removal from the trust, and after an injunction had been issued against him to restrain him from selling, which injunction had been served and was in force. The defence was the bona fides of the purchase as regarded the purchaser and his entire ignorance of the suit in chancery, and of

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the injunction in the cause; but the defence was ruled, and the purchase declared invalid, and he decreed to convey to Mrs. Green the cestui que trust, on ground that the lis pendens was notice to the purchaser, and that although he had no knowledge in fact of the suit of Green against Winter when he made the purchase, was nevertheless chargeable with legal or constructive notice so as to render his purchase subject to the event of that suit. The established rule was declared to be that lis pendens duly prosecuted and not collusive, is notice to a purchaser, so as to affect and bind his interest by the decree. The same principle was recognized and acted upon in the case of *Murray v. Lyburn*, where the chancellor held the suit to be constructive notice to all the world of the claims of the cestui que trust, and observed that there is no principle better established, nor so founded on more indispensable necessity than that a purchase of the subject matter in controversy pendens lite does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation.

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In these cases the sale which was avoided by the pendency of the suit was made by a party to the suit, and the thing sold was the subject of the litigation; and I apprehend that *those two features must distinctly appear in the contract of purchase and sale which is sought to be impeached on the ground of the lis pendens, to make the principle of that objection applicable to the case. It is a principle resting more upon the policy of the law and public convenience than upon any moral wrong in the purchaser, or private right in the party objecting to the purchase. In the case before me the purchases of the complainant were made, one of them of the assignees Hart, and the other under an execution on a judgment against Sackett. Neither Sackett nor Hart, nor his assignees, nor Farrelly the judgment creditor, were parties to the suit; their rights and claims were disregarded, the complainants, and no decree or proceeding in the

can bind them or affect their interest; and by parity of reason, none of the consequences of that suit as a lis pendens can attach to them. It is perfectly well settled that a decree in a suit can bind none but those who are parties, or acquire their rights from a party after the service of the subpœna, and pending the suit. Such a decree does not conclude or affect a stranger, or any person whose title accrued prior to the commencement of the suit, and who is not made a party to the bill. No principle of policy or convenience can require that they should be interdicted or restricted in the disposition of any right they may have in the subject in controversy between others, in a suit to which they are not parties, during the pendency of that suit; for as the decree that may be pronounced in it will not bind them or their interest, so it cannot bind or affect their assignees; and it is wholly immaterial whether the rights they claim, which must remain open for litigation, are asserted and proved by themselves or those who may stand in their place. Besides, the right or lien of the judgment creditor, or of the complainant as assignee of the judgment or as purchaser under it, can in no just sense of the term be regarded as subjects of that suit, or be avoided as within the scope of that litigation. It was a suit for an account and partition, and the parties to it assume to represent themselves as solely interested in the estates, and proceed on that basis to dispose of the property and distribute the proceeds. They leave the interests and *the claims of others untouched and unimpaired; and it would be carrying the rule beyond the reason of it, to hold that those persons whose interests or claims are not noticed by the bill, and who are not parties to the suit, should be controlled or restricted in the free exercise of their power of alienation and right of disposal of their estates, until that suit shall be determined when the determination of it cannot conclude or affect them. (Newland, 507.)

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Thus in the case of *Worsly v. The Earl of Scarborough*,

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where there was a question depending in equity upon right to money secured upon an estate, but no question relating to the estate, a purchase of the estate pending the suit was held not to be affected by the pendency of the suit. (3 Atk. 392.) So in the case of *Moore v. Marra*, (2 Ball & Beat. 186,) where a creditor filed a bill against the devisee of the debtor for an account and there was a decree with liberty to the other creditors to come in and prove their demands. The devisee, having a leasing power under the will of the debtor after the bill filed, made a lease of part of the lands devised pursuant to the power, and a motion was made for a decree to set up the devised estates, to be sold discharged of the lease; and the case of *Garhel v. Durdin* was cited, the chancellor said that the case differed materially from that; for that the creditor only prayed to have the debt raised, and for an account consequently thereon, but the title and possession of the estate was not drawn in question.

It follows that the complainant in this suit, as he was not a party to the suit of Willard and others against the executors of Robert Lylburn, nor was his judgment against any party to that suit, was not disqualified by the pendency of that suit from acquiring rights in the judgment and sheriff's sale. Nor do I perceive any good reason why his title should be void as against the defendants by means of the statute against champerty. He derives his title from a judicial sale, and though he purchased pending a suit relative to the general estate, which the premises purchased by him were a portion of, he did not purchase of a party to the suit, nor was the property he purchased the immediate subject of controversy between the parties to the litigation.

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*In the case of *Jackson v. Ketchum*, (8 John. R. 307,) which was relied upon to show that the purchase was an act of champerty, a sale was made by the defendant in the suit of premises for the recovery of which a vendor's lien was claimed.

had been obtained, between the verdict and the judgment and with full knowledge of the verdict, and an action was there brought by the purchaser against the lessor of the plaintiff in the former action for the recovery of the same premises, and in which second suit the same questions arose that had been litigated in the previous suit; and under these circumstances it was that the court held the purchase to be an act of champerty and the deed inoperative and void.

That case, then, cannot govern this. Here was a judicial sale of a right not in litigation, and if the purchase of such an interest at such a sale is champerty, no purchaser at a sheriff's sale is safe, unless the party against whom the execution issues is in actual possession at the time of the sale. But if the sheriff's sale should be held inoperative for want of possession of the land by the debtor, or by means of an adverse possession against him at the time, the judgment cannot be affected by that circumstance, but it will continue a lien on the estate it originally bound, and all subsequent purchasers and possessors must take and hold subject to the charge it created.

It was contended that the judgment of Farrelly was paid before the sale was made under it, and the testimony of Sackett is relied upon to establish that fact. Sackett testified that after the judgment was obtained against him, he caused a letter to be written to Farrelly, requesting to know the amount of his demand; that Farrelly stated in answer, that his demand amounted between \$200 and \$300; and that the complainant paid the sum to Farrelly, and he (Sackett) gave the complainant his note therefor. Giving entire credit to this statement, it is not sufficient to prove the allegation of payment; for there is no proof of the payment of the note, and Sackett himself consented to the execution on the judgment as a subsisting security and charge upon the estate. But the proof of payment was incompetent, for there is no allegation in the pleadings that the judgment was paid; *on the contrary,

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bill alleges that it was unsatisfied, and the answer admits that it was so.

But it is said that the complainant is precluded by his claim under the deed from Sackett to Miller from setting up a claim under the judgment of Farrelly, as being inconsistent therewith. I do not perceive the incongruity of the claims. The deed from the assignees of Hart may not convey so large an interest as the sheriff's sale. The priority of payment of Willard's demand was, probably, supposed to reduce the value of the complainant's interest under his purchase from Hart's assignees, and when the actual state of the trust vested in Miller was discovered, and it was proved that the claim of Willard under it was insisted upon, the complainant would naturally be alarmed for his safety, and that may have been the reason of his purchasing the judgment and causing a sale to be made of the property under it for his security and indemnity. The lien of the judgment was prior to the deed to Miller under which Willard claimed, but it was not inconsistent with that deed any more than any incumbrance is inconsistent with the conveyance of the estate which it incumbers. Miller took the premises conveyed to him subject to that judgment; and the complainant by acquiring that judgment, and by the sale under it, became vested with a prior right to that of Miller.

Nor do I think that the complainant has lost his rights by acquiescence or neglect. He was willing and desirous to come in as a party to the suit of Brewerton against the widow and executors of Lylburn, and have his rights settled in that suit; but the parties to that suit would not admit him as a party, and he was driven to his original suit, which was commenced within a reasonable time.

But it is said he had an adequate remedy at law. That objection comes too late. If it was tenable, it should have been taken by way of demurrer, or have been insisted upon in the answer.

But his claim is of equitable cognizance. The estate

of Robert Lylburn had been sold, and he had a right to affirm the sale and claim his proportion of the proceeds instead of *bringing his suit at law for the land. Besides, his right was of an undivided share, and he was entitled to a partition of the real estate and an account of the personal; and on that ground he might elect to come into a court of equity in the first instance; and considering the difficulties and embarrassments thrown in his way, and that an injunction was necessary as a measure of precaution to preserve his rights, he acted prudently in taking that course.

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It remains to consider what relief the court ought, under the peculiar circumstances of this case, to give the complainant? Am I to treat him as the purchaser of the whole interest in the one sixth part of the Lylburn estate, and on that basis decree to him the entire one sixth part or share of the proceeds of the real estate at the master's sale? or is the court at liberty to disregard the sheriff's sale, and decree the complainant an incumbrancer entitled to the amount due upon the judgment of Farrelly with interest?

If the court has the power to choose between these alternatives, equity would decidedly prefer the complainant's title to relief as the assignee of the judgment to that of purchaser at the sheriff's sale; and as the purchaser was subject to be redeemed, and a decree of the amount due on the judgment is equally beneficial to him as a redemption would have been, I am unable to discover any insuperable objection to the principle of such a decree, but I am led by many considerations to decide in its favor. The sale has not been consummated by a deed of conveyance, and the same premises were again sold within the year allowed for redemption, by the master under the decree of this court in the suit of Brewerton and others against Ann Lylburn and others, for partition; the complainant stood by and saw the second sale and took no step to restrain it. The decree directing the sale in par-

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It would have been most equitable and just, as regarded all the parties, to have delayed the sale until it could be made under more propitious auspices. The defendant and his counsel acted under a mistake of his rights; but they acted on the faith of a decree of this court, which, on the face of it, fully recognized those rights, and which appears to have been known to the complainant in this suit. The complainant, in his capacity of execution creditor, on his part, with full knowledge of those circumstances, persisted in his legal rights under the judgment, and pressed those rights with severity upon his adversary. He has perhaps encroached in his pressure upon the rule which equity prescribes for cases similarly circumstanced; and, as he has acquired no legal title, but has agreed that the title of the purchasers at the subsequent sale under the decree in partition shall stand, and now makes his claim upon the proceeds; and as that sale precluded the

exercise of the right which the defendant Willard, or his trustee for him, would otherwise have had to redeem the premises by paying the amount of the complainant's bid to the sheriff, with interest: inasmuch, also, as his utmost right or equity as a judgment creditor would have been to have his judgment debt fully paid to him, and as moreover he became himself the purchaser at the sheriff's sale, I am clearly of opinion that equity will be best satisfied by restricting his relief to an indemnity to him as the assignee of the judgment; and I can discover no impediment growing out of the sale under the judgment, or the sheriff's certificate to an adjustment on that principle. I do not mean to impair the right he may have acquired by his purchase, but it is manifest that I cannot give full effect to the sheriff's sale. The complainant claims the character of a purchaser without notice, but his purchase was subject to redemption, and I think I mete him the full measure of his equity by decreeing to him the amount paid by him for the purchase of the judgment, with interest from the time of the purchase, and payment of the consideration money for it, out of the fund in court in the first instance, and I accordingly so decree.

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As to the question of costs, the opinions I have expressed on the merits would seem to give the rule. Both parties have been wrong. The complainant contended for much more than he has established, and the defendant has been but partially successful in his defence. This failure of each in the claims and pretensions urged by him in the controversy between them precludes either from any just claim for costs against the other, and each party must pay his own costs of suit.

Let it be referred to a master to ascertain and report the amount due on the judgment.

Carpenter and wife applied for a re-hearing, which was granted. The cause was thereupon re-heard before the present chancellor.

1830. *H. W. Warner and J. Tallmadge*, for the complainant
 White v. Carpenter. No trust resulted to Willard. A resulting trust cannot be raised against the intention of the parties, nor in opposition to their written agreement. Neither can a resulting trust arise where the party advancing the purchase money looks to a different security than the title to the estate conveyed. It is essential, also, to a resulting trust, that the payment of the money be coeval with the giving of the deed; and a resulting trust cannot arise unless the whole consideration for the whole estate, or for the moiety or third, or some other definite part of the whole, is paid. (*Gilman v. Brown*, 1 Mason's R. 212. *St. John v. Benedict*, 6 John. Ch. R. 116. *Steere v. Steere*, 5 John. Ch. R. 1. *Botsford v. Burr*, 2 id. 409. *Fawell v. Heelis*, Ambler, 724. S. C. Dickens, 285. *Hughes v. Moore*, 7 Cranch, 176. *Nairn v. Prowse*, 6 Ves. jun. 752, *759. *Cowell v. Simpson*, 16 id. 280. *Brown v. Gilman*, 4 Wheat. 255. *Bagshaw v. Spencer*, 2 Atk. 578. *Pickens v. Dowdall*, 2 Wash. R. 106. *Representatives of Wm. Wragg v. Comptroller General and others*, 2 Dessau. R. 509.) Willard had no equitable lien or mortgage upon the estate conveyed by Sackett to Lylburn for the consideration money for his Virginia lands. An equitable lien or mortgage and a resulting trust depend much upon the same principles. The intention of the parties must be inquired into in both cases; and where there are written instruments, no extrinsic evidence as to the intention of the parties is admissible. (Rob. on Frauds, 94.) The acceptance of the order by Sackett was a personal engagement to pay the \$3000 to Willard, when that sum should be received by him from the avails of the estate; but no direct charge was created by it upon the property. The judgment recovered by Farrelly was a lien upon the estate in the hands of Sackett, which was paramount to any claim on the part of Willard for his demand of \$3000. The purchase by the complainant under the judgment entitles him, as purchaser, to the whole estate. He at

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least is entitled to an allowance for the whole amount due upon the judgment, and not merely to the amount paid. (Powell on Mort. 143. *Darcy v. Hall*, 1 Vernon 49. *Long v. Clopton*, 1 id. 464. *Williams v. Springfield*, 1 id. 476.) The complainant is not chargeable with notice of the rights of Willard in the premises. The deed to Miller contains no evidence of any previous equitable estate in Willard. A purchaser is only bound to look into the deed to his grantor. He is not chargeable with notice of the contents of the antecedent deeds. (*Ferrars v. Cherry*, 2 Vern. 384. *Draper's Company v. Yardley*, 2 id. 662. *Mertins v. Joliffe*, Ambler, 313. Sugden's Law of Vendors, 499.) The complainant is not chargeable with notice of the two suits which were commenced in relation to the Lylburn estate, he not being either a party or privy to those suits. Nor were his purchases of the judgment and of the premises at the sheriff's sale void, because made pending such suits. The doctrine of lis pendens is not applicable to this case. It only applies where something in litigation is purchased, and from one of the parties to the suit. (*Worsley v. The Earl of Scarborough*, 3 Atk. 392. *The Bishop of Winchester v. Paine*, 11 Ves. 197. *Murray v. Ballou*, 1 John. Ch. R. 576.) A bona fide purchaser from a trustee takes the trust estate discharged from the trust; and where a party having notice conveys to one without notice, the grantee will not be presumed to have notice.

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R. Sedgwick, for defendants. The complainant has no good title to the premises in question. He should show his right to the same as a bona fide purchaser. Farrelly's judgment was not a lien upon the premises. (*Yeates v. Groves*, 1 Ves. jun. 280.) There is a distinction between a lien by a judgment and a specific equitable lien. Willard, in this case, had a specific equitable lien, which had a preference over the general lien created by Farrelly's judgment. Willard did not take such a distinct security

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as deprived him of this equitable lien. His lien could only have been divested by a bona fide sale without notice, not by a judgment. If Farrelly had no lien by virtue of his judgment paramount to Willard's equitable lien, the complainant could not acquire any such lien as the assignee of Farrelly. The complainant ought to have shown the sum due on Farrelly's judgment. He is chargeable with notice of the rights of Willard at the time of his purchase from the assignees of Hart and at the time he took the assignment of Farrelly's judgment.

[*263] THE CHANCELLOR. Before going into the general merits of the cause, it may be necessary to examine an objection made on the argument as to the extent of the order for rehearing. It was insisted by the complainant's counsel that the order for rehearing was special, and was to be confined to the question whether anything was due from Sackett on the Farrelly judgment. The order for rehearing appears to have been granted by the consent of the solicitor of the complainant, founded upon two petitions of the defendants. The grounds of complaint, as stated in the petitions, are that the judgment of Farrelly on the property not to have been deemed a lien on the Lylburn property, so as to give the complainant any claim on the money in court; and that the decree was founded on the assumption of the fact that the property had been conveyed White under the sheriff's sale, when in fact no such conveyance was ever executed. The order directs that the cause be reheard in regard to the question whether anything and how much is due to the complainant, under or upon the judgment of Patrick Farrelly in the pleadings mentioned. This embraces the whole controversy so far as it has been decided against the defendants, except as to the question of costs. The late chancellor had decided that White had no claim upon the fund by virtue of the deed from Sackett to Hart, as the property was conveyed to the latter subject to the prior equity of Willard to be first

paid out of the proceeds of the sale ; and the fund in court is admitted to be insufficient for that purpose. If this part of the decision was correct, the complainant was not entitled to any part of the fund unless it was due to him under or upon the judgment of Farrelly. The question as to the general costs in the cause was not embraced in this order for a rehearing ; and in respect to those costs the decree could not be varied under this order, unless the complainants had elected to consider the cause open as to that question. On the argument the complainant's counsel did go into the question as to the validity of his paper title independent of the Farrelly judgment, which question I shall presently consider.

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I think the defendant's counsel is under a mistake in supposing the late chancellor went upon the assumption of the fact that the property had been conveyed to White under the sheriff's sale. In the first place it is impossible to suppose it had been so conveyed. The sale took place in July, 1822, and this suit was commenced shortly thereafter. Long before the expiration of the time allowed for redemption the land had been sold and conveyed under the partition sales. And White, under the agreement made with the parties in that suit, in February or March, 1822, had also relinquished to the purchasers under the decree all his claim upon the land. When that agreement was made, if the judgment was a lien upon the premises, Willard and Miller as the owners had a right to redeem by paying the amount of the bid and ten per cent. interest thereon. The general lien of the judgment was turned into a specific lien to that extent ; and the *rights of the parties in the fund produced by the sale in partition are at this time the same as they were in the land at the time the agreement of 1822 was made ; as the sale in partition under that agreement rendered it impossible to perfect the title under the sheriff's sale. Although Chancellor Jones considered the sheriff's sale valid, it is evident he did not consider it as materially varying the rights of the parties,

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or he would have decreed the whole fund in court to the complainant, instead of the balance due on the judgment.

The deed to Miller gave a full and perfect lien upon the property to the extent of Willard's claim.[1] And the

[1] Lien, in its proper sense, is a right which the law gives; although it is usual to speak of lien by contract. *Ridgley v. Iglehart*, 3 Bland. Ch. Rep. 542. Of liens given by common law, by equity, by marine law, by statute, and by contract. *Ib.* At common law a lien exists ordinarily only where the party entitled thereto has either actual or constructive possession of the goods. *Ex parte Foster*, (in bankruptcy,) 2 Story's Rep. 131. *Fletcher v. Morey*, *ib.* 569. But in equity it exists independent of the possession; and is not a property in the thing, nor constitutes a right of action for it; but is a charge upon the thing. *Ex parte Foster*, (in bankruptcy,) 2 Story's Rep. 131. *Parker v. Muggridge*, (in bankruptcy,) *ib.* 343. Where a lien or equitable claim, constituting a charge in rem, is a matter of agreement, it will be enforced in equity not only upon real estate, but also upon personal estate, or money in the hands of a third person; and also against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy. *Fletcher v. Morey*, 2 Story's Rep. 555. An agreement for a lien or charge in rem constitutes a trust, and is governed by the general doctrine applicable to trusts. *Ib.* 565. The lien of one who is no party to a proceeding and decree, under which property is directed to be sold, is not affected by such decree; nor can a purchaser under such decree thereby acquire the absolute title. *Portwood v. Outton's adm'r.*, 3 B. Mon. Rep. 247. A purchaser is bound to notice recitals in deeds constituting the claim of title, through which he claims; and a recital that the deed is made up on a consideration paid and secured to be paid, is notice that it is unpaid, and the lien of the vendor respected. *Thornston v. Knox's ex'r.*, 6 B. Mon. Rep. 74. The title of a purchaser under execution sale of land, relates back to the time of the receipt of the execution by the sheriff. *Kelley v. Oldham*, 5 B. Mon. Rep. 233. A lien upon land for the purchase money, does not depend upon whether the proprietorship is evidenced by legal or equitable title. It results from the right the vendor has to make the land answerable for the price for which it was sold. *Ligon v. Alexander*, 6 J. J. Marsh. Rep. 401. A stipulation in a conveyance to indemnify against responsibility afterwards to be incurred creates a lien on the property conveyed. *Nelson's Acirs v. Boyce*, 6 J. J. Marsh. Rep. 401. When two persons have a lien on the same piece of property which is not sufficient to satisfy both, and one has a lien for his debt on another piece of property, he must exhaust the latter, before he can resort to the common fund. *Trowbridge v. Harleston*, Walker's Ch. Rep. 185. To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed. *Randel v. Brown*, 2 Howard, 406, 424. No person can acquire a lien founded upon his own

title which White afterwards acquired, under the Hart conveyance, was only of the share of the surplus which would have belonged to some of the creditors if they had executed releases as required by the deed of trust. If the condition rendered the deed fraudulent as against the creditors of Sackett, that objection cannot be urged by those who claim title through that deed. The conveyance to Hart was not for the estate purchased of Lylburn; but it was for the share which Sackett appropriated for the payment of certain creditors, out of the surplus to be raised by Miller on a sale by virtue of the trust deed. It did not profess to do any act inconsistent with that deed, but merely assigned to Hart the share of the surplus to which Sackett claimed to be entitled under the deed. Willard, by the terms of the deed, was not required to execute any release to Sackett. As to the amount which was to be raised and paid to him, the deed was absolute and unconditional. Hart and his assignees and White took the interest of Sackett not only with notice of Willard's right under that deed, but they took it professedly subject to that right. The proceeds of the estate being insufficient to satisfy the amount due to Willard, the complainant derived no valid claim to any part of the fund under the conveyance from the assignees of Hart.

The only doubtful question in the case is that which the late chancellor decided in favor of the complainant. Was the Farrelly judgment a lien on the Lylburn property, so as to entitle the holder thereof to satisfaction out of that property in preference to the claim of Willard?

*After a full examination of this part of the case, I have

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illegal or fraudulent act, or breach of duty. Ib. It cannot arise where from the nature of the contract between the parties, it would be inconsistent with the express terms, or the clear intent of the contract. Ib. So, if goods are deposited for a particular purpose, as to hold them, or the proceeds for the owner, or a third person. Ib. The retention of property, after the extinguishment of a lien, becomes a fraudulent possession. Ib. 422.

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arrived at a different conclusion on this point from ~~that~~ of my learned predecessor.

I concur with him in the opinion that there was no resulting trust in this case which could vest the legal estate in Willard. Such a trust cannot be raised in favor of a person by the mere payment of the purchase money, if it is not the intention of either party that the legal estate should vest in him. The office of a resulting trust is to carry into effect the intention of the parties, not to defeat that intention; and it can never be raised in opposition to the written agreement of the parties on which the conveyance was founded. (6 John. Ch. Rep. 111.) The writings in this case show that it was the intention of the parties to vest the legal estate in Sackett, for the purpose of enabling him to raise money thereon for Willard to the extent of \$3000. Notwithstanding the loose testimony of Sackett, I have not the least doubt, from the other testimony and from the written evidence in the case, that the transaction was substantially as stated in the answer of Willard. Although the deed is dated on the 19th of March, one day previous to the date of the other papers, it was not recorded until the twenty-first. And I think there is evidence on the face of the papers themselves to show that the actual consummation of the conveyance to Sackett, the execution of the bond to Lylburn for the Virginia lands given in exchange, the making of the order for the payment of the \$3000 out of the proceeds of the Lylburn property and the acceptance thereof by Sackett, were all one transaction. These instruments must therefore be taken and construed together. (1 John. Ca. 91. 13 Mass. Rep. 51. 1 Paige's Rep. 455. 1 Greenleaf's Rep. 11.) Taking all these writings, which were executed at the same time and in relation to the same subject matter, and construing them together, there is no resulting trust so as to vest the legal estate in Willard. But there is an appropriation of the proceeds to be raised on the sale of the property, for the specific purpose, in the first place, of

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paying the \$3000 to Willard. It was in substance a declaration in writing on the part of Sackett that he had received the conveyance from Lylburn, *in trust to sell or mortgage the property for the purpose of raising the \$3000 for Willard, in satisfaction for the lands given in exchange, and to retain the residue of the proceeds for his own trouble and commissions in effecting such exchange. If he had given to Willard a writing containing an express declaration that he held the lands on that trust, can there be any doubt that equity would compel a specific performance thereof? This view of the case is corroborated by the recitals in the trust deed to Miller. If the rights of third persons had not intervened, can there be any doubt in this case that a court of chancery would have compelled Sackett to execute the trust, by selling the estate and applying the proceeds as directed in the order accepted by him? If such was not the object and intention of Sackett at the time this exchange took place, he intended to commit a gross fraud upon Willard; and the court must in that case convert him into a trustee for the person intended to be defrauded. Sackett had a right to sell the estate and receive the money therefor, as such was the manifest intention of the parties. But as the proceeds of the sale, to the extent of \$3000, were specifically pledged and appropriated to the payment of Willard's claim, a creditor of Sackett would not have been permitted to receive a conveyance in satisfaction of an antecedent debt. If Sackett had sold the property to a bona fide purchaser, or had mortgaged it to secure money loaned on the credit thereof, the purchaser or mortgagee would have been protected; and would not have been held for the application of the fund. But if any person had advanced money thereon with a knowledge that Sackett intended to defraud Willard out of his purchase money, such person could not be considered a bona fide purchaser.

If Willard had a specific lien upon the proceeds of the

1830. property, he is entitled to a preference over the general
lien of a judgment creditor of Sackett. At law a judg-
ment is a general lien upon all the legal interest of the
debtor in his real estate; but in chancery that general
lien is controlled by equity so as to protect the rights of
those who are entitled to an equitable interest in the
lands, or in the proceeds thereof. I have recently had
occasion to examine that *question in the case of Howe
and wife, (1 Paige's Rep. 125,) and it would be useless
for me to re-examine the authorities referred to on that
occasion. The judgment of Farrelly only attached upon
the interest which Sackett had in the real estate of Lyl-
burn after satisfying Willard's debt. And as White had
notice of Willard's claim previous to the sale under that
judgment, the only effect of his purchase was to turn what
was before a general lien upon the surplus, if any there
should be, into a specific lien thereon to the extent of
his bid. The decree of June, 1827, must therefore be
modified so as to declare that the defendants Carpenter
and wife, as the legal representatives of Willard, are en-
titled to the fund in court, or to so much thereof as is ne-
cessary to satisfy the \$3000 and interest thereon from the
date of the trust deed given to Miller.

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If the question of costs was now open, I should not be
inclined to allow them against the complainant, under the
particular circumstances of this case. At the time the
bill in this cause was filed, it was not known what the
proceeds of the Lylburn estate would amount to. The
complainant was certainly entitled to a preference over
the creditors of Sackett named in the schedule annexed to
the trust deed, at least to the extent of what was due on
the judgment; and he has litigated in good faith. I think
also that the order for a rehearing precludes me from
altering that part of the decree which denies costs to the
defendants.

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Where upon a loan of money, a premium or profit beyond the legal rate of interest is either directly or indirectly secured to the lender, the loan will be usurious, unless it is attended by some contingent circumstances which subject the money lent to evident hazard.

A mere nominal contingency, attended by no real hazard of the principal of the money lent, will not divest the transaction of its usurious character.

The ordinary risk of the death or insolvency of the borrower, is not such a hazard of the money lent as will authorize the lender to reserve a profit on the loan beyond the legal rate of interest.

If there is a negotiation for a loan or an advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending within the meaning of the statute against usury; and if a profit beyond the legal rate of interest is reserved or agreed to be paid, the contract is usurious.

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Under the regulations of the chamber of commerce, the agent is entitled to two and a half per cent. for effecting a loan of money and becoming security for the re-payment thereof; but he is not entitled to an additional commission for paying over the money to the principal or upon his orders.

Where a loan is to be repaid by an investment in merchandise for the lender, the merchandise must be estimated at its actual costs in specie or other circulating medium which is a legal tender at the place of payment, and not at its nominal costs in a depreciated or fictitious currency.

In December, 1824, the complainant was the owner of the brig *Ortolan*, and was about to proceed on a voyage from New York to Rio Grande. Being short of funds to complete the cargo of his brig, he applied to the defendants, who were merchants in New York, to assist him in completing the cargo, and proposed that they should advance \$3000, and become interested with him in the profits of the cargo to that extent. The defendants finally agreed to make the advance of \$3000, which was to be repaid by the complainant at Rio Grande, with addition of 20 per centum thereon, by being invested in the purchase of hides and horns on account of the defendants.

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This sum being insufficient to complete the cargo, the loan was effected by the complainant from the Insurance Company upon respondentia, and a guarantee of the defendants for its re-payment. It went into the defendants' hands, together with a sum of \$500 received on account of passage money. The defendants charged a commission of two and a half per cent. for procuring the loan from the insurance company. Including that commission, and a further commission of two and a half per cent. on the whole amount, the sum advanced to the complainant, paid on his order, and pending for his benefit, the sum of \$7483.33, leaving a balance due to them, according to their account, in January, 1825, of \$3982.33. From this sum deducted for some cause not explained in the plea in this suit; and the complainant gave them a written instrument for the balance in the following terms: 'E. W. Dunham & Co. New York, Jan. 27, 1825: Gentlemen, Having advanced me thirty-nine hundred and seven and three quarters dollars in cash and goods for the purchase of the cargo of the brig Ortolan, bound to Rio Grande, I hereby acknowledge the receipt of the same, and as by our agreement you are to receive the cargo of the Rio Grande, with twenty per centum thereon, in the profits on the merchandise shipped in her, I engage to pay you by vesting the above mentioned sum with the twenty per centum added, in Rio Grande hides and horns, and ship them to your address on your account and risk, in the brig Conveyance, or other vessel which you shall send out consigned to me. And as an inducement to you to send out the brig Conveyance, or some other good vessel, to my address, I engage to freight with her at least three thousand and five hundred hides at the rate of fifty cents each to New York, besides horns at the usual freight, on my account of my friends, besides those to be shipped to your order. Your obedient servant,

Walter C.

A further sum of \$72.25 was paid for the complainant by the defendants after he left New York, of which they soon after advised him. The defendants also shipped on board the complainant's brig 100 barrels of flour, to be sold by him at Rio Grande, on their account; the profits on which were to be equally divided between the parties. The complainant arrived at Rio Grande about the middle of April after he left New York, and disposed of his cargo early in May. The Conveyance did not arrive at Rio Grande until the first of August, at which time no part of the return cargo had been purchased by the complainant. On the 23d of October, 1825, the complainant shipped on board the Conveyance 558 dry ox and cow hides, and 100 arrobas of hair, for the purpose of paying the respondentia bond given to the insurance company; and which were addressed as directed in the instructions of the defendants. The complainant also at the same time shipped 600 hides and 10,000 horns, on account of the defendants, for the payment of the advances made by them in New York together with the premium thereon; and also two other parcels on account of the defendants' share of the proceeds of the flour and a quantity of salt sold upon their account at Rio Grande. The complainant likewise shipped *on board the same vessel a quantity of horse-hides and hair on his own account, which were received and sold by the defendants. The average weight of the hides shipped to pay the respondentia bond was about six pounds more than the weight of those shipped on account of the defendants, although they were invoiced at the same price. The defendants insisted that the hides were bought in numero, at the same time and at the same prices; and that in the account of sales they should be averaged and credited according to their weight. The return cargo purchased on account of the defendants was invoiced and purchased in reas and millereas, the nominal currency of Rio Grande, and were charged by Colton at \$1.25 for each millerea. But the defendants insisted that the Spanish

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1880. milled dollar at Rio Grande was equal in value to a millere, and that the accounts should be stated accordingly. Colton v. Dunham. These as well as other difficulties having arisen in relation to the adjustment of the balance between the parties, the complainant filed his bill in this cause for an account; and he insisted, among other things, that the agreement for the payment of twenty per centum on the advances of the defendants was unconscientious and usurious, and ought not to be enforced beyond the legal rate of interest. The cause was heard on pleadings and proofs.

S. A. Foot and J. Greenwood, for the complainant. The contract for the payment to the defendants of 20 per cent upon their loan to the complainant was usurious. There was a clear contract of lending. The repayment of the money advanced depended upon no contingency. Although the goods shipped for Rio Grande had been lost, yet the defendants would have been entitled to repayment with 20 per cent. interest. The 20 per cent. was not to be paid out of the profits of the adventure. The investment of the defendants' loan in a return cargo was for their benefit. (*Jestons v. Brooke*, Cowper, 793. *Hoyer v. Edwards*, id. 112.) Moneys overpaid beyond the legal interest in pursuance of an usurious contract will be ordered to be repaid. (*Dey v. Dunham*, 2 John. Ch. R. 182.) The defendants are only *entitled to legal interest from the time of the actual payment of their loan to the complainant. They are not entitled to a commission for payment over to the complainant the money loaned from the Pacific Insurance Company. Nor are they entitled to any compensation for their guarantee of the payment of the note taken upon the sale of the complainant's goods. Their services in this respect were rendered without the complainant's request. And they had no right to average the weight of the hides; but are bound to account to the complainant for the proceeds actually realized from the sale of the hides purchased on his own account. As to the

question whether the laws of Rio Grande or of New York are to govern as to the construction and effect of the contract between the complainant and defendants, and as to the *lex loci* generally, the counsel cited *Andrews v. Herriot*, (4 Cowen's Rep. 510 and note;) *Thompson v. Ketcham*, (4 John. R. 285;) *James v. Allen*, (1 Dallas' Rep. 191;) *Winthrop v. Pepon, Otis & Co.*, (1 Bay's Rep. 468;) *Slacum v. Pomery*, (6 Cranch's Rep. 221;) *Lanusse v. Barker*, (3 Wheaton's Rep. 101, 146;) *Kissam v. Burrall*, (Kirby's Rep. 326;) *Fanning v. Consequa*, (17 John. R. 511;) *Winthrop v. Carleton*, (12 Mass. Rep. 4;) *Gaillard v. Gaillard*, (1 Nott & McCord's Rep. 67;) *Emory v. Grenough*, (3 Dallas' Rep. note, 370 to 377.)

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J. Talmadge, for the defendants. The loan to the complainant by the defendants was not usurious. The hazard to the principal divests it of its usurious character. The profits upon the outward cargo to Rio Grande are extravagant; but upon the return cargo a loss is always sustained. This circumstance puts at rest the question of usury. The compensation to the defendants was to proceed from the profits upon the outward cargo, and was not to be paid in the character of interest upon the sum loaned. The defendants were interested in the adventure. The commissions charged by them are authorized by commercial usage. And as they sold a large quantity of hides for the complainant, it was just to average the result.

*THE CHANCELLOR. It is admitted by the counsel for both parties that there must be a reference to state the accounts between them; but the court is at this time called upon to decide certain questions arising out of the pleadings and proofs, by way of special directions to the master, settling the principles on which the accounts are to be stated. On the part of the complainant it is insisted, 1. That the agreement to pay 20 per centum on the advances

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was illegal and usurious; and that if it was not usurious, it was unconscientious and oppressive, and ought not to be enforced; 2. That the defendants are not entitled both to commissions and interest on their advances, except as to the articles actually purchased by themselves; 3. That they are entitled to no commissions on the money loaned of the insurance company, except the two and a half per cent. for procuring and guaranteeing payment of the loan; 4. That they had no right to average the weight of the 558 ox hides shipped on account of the respondentia bond, with those sent to the defendants on account of their advances; and 5. That they are not entitled to a commission for guaranteeing payment on the sale of the complainant's hides and hair. The reverse of these propositions is contended for on the other side; and the defendants also insist that the millerea of Rio Grande is only equal in value to a Spanish milled dollar, and that the hides and horns purchased for them in payment of their advances should have been charged at that rate only.

In relation to the first question, it is evident the agreement between the parties was in fact nothing but a loan or advance of money, to be repaid by the complainant on his arrival at Rio Grande, together with a premium of 20 per centum on the loan. The English as well as the American reports are filled with cases arising out of the various devices and expedients which have been adopted to evade the provisions of the statutes which limit the rate of interest to be received on the loan or forbearance of money. But on examination it will be found there is a uniform and settled principle running through all these cases, with scarcely any exceptions. Wherever by the agreement of the parties a premium or profit beyond the legal rate of interest, for a loan *or advance of money, is either directly or indirectly secured to the lender, it is a violation of the statute unless the loan or advance is attended with some contingent circumstance by which the principal is put in evident hazard.

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A contingency merely nominal, attended with little or no hazard to the principal of the money loaned or advanced, cannot alter the legal effect of the transaction. And the risk of loss by the death or insolvency of the borrower is not such a contingency or hazard as will take the case out of the operation of the statute. That is the ordinary risk which every man runs who lends money on personal security only; and if the contingency of the borrower's dying insolvent was to be deemed a hazard of the principal, or money lent, the statute of usury would be a dead letter. Where there is a negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending within the spirit and meaning of the statute. And whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious. In the case under consideration it was never the intention of either party that the defendants should have an interest in the cargo put on board the complainant's brig. If the goods had been lost on their passage to South America, he must have borne the whole loss, and would have been liable to the defendants to the same extent as if the goods arrived in safety and a large profit was realized thereon. The investing of the amount in hides and horns at Rio Grande on their account, instead of remitting the money from that place, was never considered as a hazard on the part of the defendants. It was done for their benefit, and because they expected to realize a further profit out of the proceeds of that investment. If they sustained any loss in this case, it was one of those mercantile hazards which frequently occur; but it is evident from their letter of the 14th March, 1825, that they expected to realize a handsome profit upon the cargo shipped on board of the Conveyance, in addition to their commissions and the 20 per cent. advance upon the loan to

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Colton. The account in *this case must be stated by allowing to the defendants only legal interest on the amount of their advance, from the 27th of January, 1825, to the time when the same was paid or invested for them at Rio Grande. And if the complainant does not produce the original bills of parcels, showing when the investment was made, the interest must be cast up to the 23d of October, when the hides, &c. were shipped on board the defendants' vessel.

The defendants are not entitled to commissions for paying over the money borrowed of the insurance company, to the complainant or on his orders. The commission of two and a half per cent. for effecting the loan, and becoming security for the re-payment thereof, is admitted to be correct; and that is all to which they were legally entitled. I presume that question was settled between the parties at the time the receipt or agreement of the 27th of January, 1825, was given. The balance of the account, as stated on the 28th of January, is \$3982.33, and the complainant's receipt is for the same sum, less \$75, which is just the amount of the illegal commissions, included in that account, on the disbursement or payment of the money loaned on respondentia. That receipt must be considered as the liquidated amount of the defendants' advances and legal commissions up to and including the 28th of January; to which must be added the \$72.75 afterwards paid by the defendants, as mentioned in their letter of the 14th March. I presume the error in that letter arose from their neglect to correct the account, by expunging therefrom the illegal commission so as to make it agree with the receipt given on the settlement thereof; and from that letter the error was transcribed into the complainant's account transmitted to them from Rio Grande.

As the complainant has produced no bills of parcels, showing the particular persons from whom the hides shipped for the defendants were purchased, or the times

when, or the prices for which they were bought, and as his letters show that he had not purchased any hides previous to the arrival of the Conveyance, the defendants' account of sales, averaging the hides, must be considered by the master as correct, unless the complainant produces the original bills of parcels *showing the separate purchase of the hides shipped for the defendants and the original bill of the 558 hides, or produces other sufficient and legal evidence before the master showing such purchases, and the persons from whom, and the prices at which they were made.

The defendants are not entitled to a commission on the sale of the complainant's hair and horse hides, as a guarantee commission. They were under no legal obligation to guarantee the payment by the purchasers, and there was no agreement that they should be responsible therefor. That claim must therefore be disallowed. But from the facts in the case, the defendants are clearly entitled to the commission for selling the hides as well as the hair.

The only remaining question is as to the valuation of the millerea at \$1.25. As I understand the case, 800 reas are a dollar, and the millerea is 1000 reas. But there is no coin or circulating medium of the country which answers to either the rea or the millerea; and that the actual value of the Spanish milled dollar, especially when restamped, was nearly equal to the nominal amount of a millerea. The advance of the defendants was to be repaid to them at Rio Grande in specie, or in something else which was a legal tender according to the laws of that country. If a Spanish milled dollar, and the other circulating medium there in the same proportion, would be received in payment of 900 or 1000 reas on the purchase of hides and horns, the complainant as a faithful agent was bound to purchase and pay for them at that rate. He cannot be permitted to make a speculation at the expense of the defendants, by paying them in a flo-

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v.
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Lorillard
v.
Robinson.

titious or depreciated currency. He can only be allowed so much as he actually paid for the property, in the circulating medium of the country which would have been a legal tender in the payment of his debt to the defendants. The master must ascertain the cost of the hides, &c. on that principle, and state the accounts accordingly. He is to have the usual power to examine the parties on oath, and to compel the production of books and papers. The question of costs and all further directions are reserved until the coming in of the report.

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*LORILLARD v. ROBINSON AND OTHERS.

The court of chancery has no general jurisdiction over its suitors to compel them to pay costs due to their solicitors, or counsel.

The proper remedy of the solicitor or counsel to recover his bill of costs, is by an action at law against the client.

The client may apply to the court for the taxation of his solicitor's bill, and for a stay of the proceedings at law thereon, upon an undertaking to pay what shall be found due; and in such cases the court of chancery may compel the client to perform such undertaking.

But this court has no jurisdiction to order the taxation of the bill, as between solicitor and client, on the application of the solicitor himself, if there is no fund under the control of the court out of which payment can be made.

May 25th.

THIS was an application, by Robinson's solicitor, for a reference to a taxing officer to tax his costs, counsel fees and disbursements, as between solicitor and client. Robinson, the client, died pending an appeal to the court of errors, and administration of his estate was granted to the public administrator in the city of New York. The public administrator resisted the application upon the ground that the solicitor's remedy was at law, and that the chancellor had no jurisdiction to order the payment of the costs.

J. Radcliff, the petitioner, in person.

1830.

W. Kent, for the public administrator.

Lorillard

v.

Robinson.

THE CHANCELLOR. It does not appear by the petition that this suit has ever been revived against the administrator of Robinson, or that he is before this court in any way, so as to give the chancellor jurisdiction to order him to pay the bill of costs due to his solicitor or counsel. The solicitor has a perfect remedy at law to recover what is due from his client. But the latter may apply to this court to have the solicitor's bill taxed and to stay proceedings at law thereon, upon an undertaking to pay what shall be found due. (2 Atk. 114. 11 Ves. 325. Buck's Ca. 388.) In such cases the court has jurisdiction over its officers; and the client, by applying to the court and undertaking to pay what is found due on taxation, gives the court jurisdiction to compel a performance of that undertaking; which performance may be enforced by attachment. But the court has no jurisdiction to order the taxation of the bill, as between solicitor and client, on the application of the solicitor himself. (*Sayers v. Walond*, 1 Sim. & Stu. R. 97.) If the solicitor has no money of the client in his hands, and there is no fund in court on which he has a lien for his costs, he may go before the proper taxing officer and get his costs taxed, and then proceed at law thereon. Or he may bring his suit without taxation, at his election, leaving the client to make an application on his part if he wishes a taxation of the costs.[1]

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The petition in this case must be dismissed.

[1] Attorneys and solicitors are public officers, and are under the control of the courts in which they practise, in regard to their behavior to their clients, and to the contracts which they make with them. And when they accept retainers from their clients, they are bound to serve them for the stated fees allowed by law for their services. But, where the attorney or solicitor is also a counsellor of the court and agrees with his client to per-

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Lorillard
v.
Robinson.

form the duties of counsel for him, upon the hearing a trial or upon the argument of special motions, he may stipulate with the client to receive a reasonable reward for the services performed by the counsel. *Merritt v. Lambert*, 10 Paige, 352. But neither an attorney, nor a counsellor of the court, will be allowed to contract with the client previous to the termination of the suit, for a part of the subject matter of the litigation, as a compensation for his services. 1 Pick. Rep. 415; 2 Mart. Louis. Rep. 281; 1 Ham. Rep. 132; 411; 6 Mon. Rep. 389; 5 Paige, 311.) Where the client makes application to the court, against his attorney or solicitor, instating a suit against him to compel such attorney or solicitor to do the latter is entitled to the benefit of using his own affidavit in his application. 1b. Where a solicitor appears in behalf of a person whom a commission of lunacy is issued, to oppose the same, notwithstanding such opposition, find such person to have been at the time of the alleged retainer of the solicitor, such solicitor may claim against the estate of the lunatic, on the ground of contract as solicitor, upon the execution of the commission. *In the matter of Conklin*, 8 Paige, 450. The court, in its discretion, may allow to the lunatic his taxable costs of opposing the commission, where the lunacy was so much a matter of doubt, that the chancery had been applied to, would have sanctioned or directed such opposition to the execution of the commission. 1b. Where in a suit for the specific performance of a contract for the exchange of lots, a receiver of the rents and profits of the premises in controversy had been appointed, and in the suit, the defendant sold his interest in one of his lots to a stranger, the purchaser employed the defendant's solicitor to conduct the suit, and agreed to give such solicitor all the rents and profits of the premises pending the litigation, in addition to the taxable costs of the suit, who still retained a part of the premises in controversy, compensation for his services; held, that such rents and profits were a part of the subject matter of the litigation, and that the agreement to give the same to the solicitor, for his professional services, was void, as that the solicitor was only entitled to his taxable costs, as attorney and client. *Merritt v. Lambert*, 10 Paige, 352. Where a lien has been obtained for the payment, by the defendants, of the costs of the suit to their answer to the complainant's solicitor, who subsequently to them that he claimed a lien for his costs in the suit, and must not settle with the complainant for the same; and they have settled with the complainant and secured to him the amount of the costs, each party agreeing to bear one half the costs of both parties. Held, that the solicitor of the complainant had a lien upon the proceeds of the sale of the property on the exceptions; but, that he had no lien as against the defendant for the general costs of the suit which had never been decreed against him. *Talcott v. Bronson*, 4 Paige, 501. Where the parties to the s

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collusive settlement thereof before a decree, for the purpose of defrauding the solicitor of his costs, his remedy is to proceed with the suit in the name of his client, notwithstanding the collusive settlement. *Ib.* The lien of the attorney for the costs of the suit is paramount to the claim of the adverse party to set off a judgment recovered against the client in another suit. *Gridlen v. Garrison*, 4 Paige, 647. See Waterman's Am. Ch. Dig. tit. SOLICITORS AND COUNSELLORS.

1830.

Belknap
v.
Tremble.

BELKNAP v. TREMBLE AND OTHERS.

Appeal causes are to be placed on the calendar of the chancellor as of the same date at which they were originally entitled to be placed on the calendar of the court below.

This was an appeal from the second circuit on a decree made upon pleadings and proofs; and a question arose, under the last clause of the 91st rule of this court, as to the place the cause should occupy on the calendar. One party had considered the matter as arising at the time the decree was entered; the other had placed the cause upon the calendar as of the time when the replication was filed in the court below.

May 28th

THE CHANCELLOR said the intention of that part of the rule was to have appeal causes placed on the calendar as of the same date at which they were placed on the calendar of the court below. That on an appeal from a vice chancellor's decree, the matter was to be considered as having arisen at the time when the bill was taken as confessed, or the plea, answer, demurrer, or replication was filed in the court below. And on appeals from the sentences of decrees of surrogates, *or of circuit judges in testamentary cases, the matter was to be considered as having arisen at the time of the *litis contestatio*, or joining of the issue, or other analogous proceeding before the surrogate.

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1880.

Bailey
v.
Inglee.

BAILEY v. INGLEE AND OTHERS.

A person is a necessary party to a suit when no decree in relation to the subject matter of litigation can be made until he is properly before the court as a party; or where the defendants in the suit have such an interest in the subject having such person before the court as would enable them to make an objection if he were not a party.

A defendant may in some cases be a proper party to a suit, although not a necessary party; as in the case of a fraudulent assignment of a trust fund, where the cestui que trust may at his election sue the assignor against the trustee alone, or may join the fraudulent trustee in the same bill.

June 7th. THE defendants Inglee and wife brought a suit against the complainant and Rhodes and Balestier. They were formerly partners under the name or firm of Balestier & Co., on a note given by that firm to Mrs. Inglee before her marriage. After the commencement of the suit, Bailey filed his bill in this cause, alleging among other things, that in 1827 he withdrew from the firm; that previous thereto Rhodes assumed the management of the note; and that on the complainant's retiring from the firm, Balestier and Rhodes covenanted with him to pay and settle all the debts of the firm. The complainant charged, that the note had been paid wholly, or at least by Rhodes or by Balestier & Co., and that upon the retirement of Balestier and Rhodes in 1828, the latter made an assignment of property or choses in action, to secure the balance alleged to be due on the note, the parties to which assignment the complainant alleges that he was unable to state; and as to which he prayed a decree against the defendants Inglee and wife and Rhodes. The complainant also prayed that the proceeds of the property so assigned might be applied towards the payment of the note; and that if he should be decreed to pay any part of the note, he might be substituted in the place of the defendants Inglee and wife as to the assigned property, and

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might also have a decree over against Rhodes and Bales-tier, founded upon their several agreements in relation to this note, and the general debts of the firm. The complaint prayed for a discovery as to all the matters stated in the bill, for an injunction to restrain the proceedings at law, and for general relief. The defendant Rhodes put in a demurrer to the bill for want of equity as against him.

1830.

Bailey
v.
Inglee.

R. Sedgwick and *D. D. Field*, for the complainant.

D. Lord, jun. for the defendant Rhodes.

THE CHANCELLOR. Persons are necessary parties when no decree can be made respecting the subject matter of litigation until they are before the court either as complainants or defendants; or where the defendants already before the court have such an interest in having them made parties, as to authorize those defendants to object to proceeding without such parties. There is also another class of cases where persons who are not absolutely necessary as parties may be made defendants at the election of the complainant. Thus, if a trustee has parted with the trust fund, the cestui que trust may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with the trustee, at the election of the complainant.

The case before me is one in which Rhodes was a necessary party, because he was jointly liable with the complainant in the action at law on the note. Inglee and wife therefore had a right to insist that Rhodes and Bales-tier should be made parties, so as to make the determination complete. (*Poore v. Clark*, 2 Atk. 515. *Breckenridge v. Bullitt*, 3 Litt. R. 5.) And if they had not been made defendants, Inglee and wife might have demurred to the bill for want of parties.

The demurrer must be overruled, and Rhodes must pay the costs and answer the bill within thirty days, or an attachment must issue against him.

1880.

Mitchell

v.

Lenox:

*MITCHELL v. LENOX AND TAYLOR.

Where a debtor failed and conveyed all his property to assignees, in trust to pay certain specified debts, and to divide the surplus or so much thereof as should be necessary among such of his other creditors as also came in under the assignment and release him from their debts, and reassign the residue to the debtor, and a number of the creditors came in under the assignment and complied with the condition, it was held that the debtor could not file a bill against his assignees, for an account of the trust property, without making the creditors who came in under the assignment, and those whose debts were specially provided for, which remained unpaid, parties to the suit.

Where the complainant has omitted to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, the proper mode of taking advantage of it is by plea or answer. But if the objection appears on the face of the bill, the defendants may demur.

June 7th.

THE complainant failed in 1798, and assigned all property to the defendants Lenox and Taylor and to Stevenson, who has since died, in trust to pay certain debts due to the United States and to H. Stevenson, and to divide the surplus or so much thereof as might be necessary among such of the other creditors of the complainant as should come in under the assignment and release him from the payment of their debts; and to reassign the residue of the property or to pay over the balance of the proceeds thereof to the complainant. The bill in this cause was filed against the surviving trustees for an account of the trust property; and it stated, among other things, that many of the creditors who were named in the bill, and whose debts amounted to more than \$44,000, came in under the assignment and complied with the condition thereof. Two of these creditors were afterwards paid by the complainant, who took from them an assignment of the demands. The defendants demurred to the bill, on the ground that the creditors who came in under the assignment should have been made parties to the suit.

J. S. Mitchell, for the complainant.

T. L. Ogden, for the defendant.

1830.

Mitchell
v.
Lenox.

*THE CHANCELLOR. The objection in this case that all the proper persons are not before the court, so as to render the decree final as to the execution of the trust, is well taken.[1] If the debts of all the creditors who were spe-

[1] A bill in chancery is never dismissed for want of parties, but may be continued to bring them in. *Nash v. Smith*, 6 Conn. Rep. 422. Though a court of chancery will usually cause all persons principally interested in the subject of a suit to be made parties, and though want of proper parties is a ground of refusing to proceed to a decree, yet the court is not bound to call in a party having merely a possible interest, and not necessarily affected by the decree. *Townsend v. Auger*, 3 Conn. Rep. 354. A bill was filed on behalf of certain infants, against the heirs of their guardian, who died intestate, the sheriff to whom the estate was committed, (no administrator having qualified,) the surviving security in the bond given for the guardian's performance of his duty, and the administrator of the security, as co-defendants. No process having been served on a part of the heirs, nor on the surviving security, a decree against the administrator of the deceased security was held to be erroneous, because there were not proper parties brought before the court, and the cause was remanded for further proceedings. *Bland's adm'r. v. Wyatt*, 1 Hen. & Munf. 43. On a bill to charge a specific legacy with the payment of an annual sum, all the parties in interest should be brought before the court; and the court may, at any stage of a case, direct a bill to be amended, so as to make proper parties; and this may be done with or without costs, according to the discretion of the court. *Cabeen v. Gordon*, 1 Hill, 58. The name of a defendant cannot be struck out of a bill, on motion of a co-defendant, without his consent or notice of the application. *Livingston v. Gibbons*, 4 Johns. Ch. Rep. 94. Where the objection of a want of parties is made out of season, the plaintiff, instead of amending the original bill, may file a supplemental bill merely to bring in the parties wanting, and the defendants to the original bill need not in such case be made parties to the supplemental bill. *Ensworth v. Lambert*, 4 Johns. Ch. Rep. 605. Where leave is given to file a supplemental bill, merely to bring in parties, the original defendants need not be parties to it. *McGowan v. Yerks*, 6 Johns. Ch. Rep. 450. A bill must state clearly the persons who are made defendants, either by praying process against them, or by a distinct allegation designating the persons impleaded as defendants. *Elmendorf v. Delancey*, 1 Hopkins, 555. A person whom the bill prays to be made a party does not thereby become a party; to make him such, process must issue and be served upon him.

1890.

Mitchell
v.
Lenox.

cially provided for by the assignment, or who came in under the same, have been paid out of the assigned property or have been otherwise satisfied, it should have been alleged in the bill. If not, the creditors should be brought to the suit, so as to subject the assignees to but one account. Had it been stated in the bill that all the creditors who came in under the assignment, as well as to whom a preference was given, had been paid or satisfied, or that they had released to the complainant claims under the assignment, the defendants might have been compelled, by plea or answer, to deny the fact, the purpose of showing that all the necessary parties were not before the court. As the objection appears on the bill itself, the proper mode of taking advantage thereof was by demurrer. In *Palk v. Clinton*, (12 Ves. 53,) it is said to be a universal rule not to allow an account taken in the absence of any person interested therein to be within the jurisdiction of the court and can be made a party. The exception to this rule is where the parties interested are numerous and the court can get the value of the fund by a bill filed by some of them suing in behalf of themselves and all others standing in the same right. (*Court v. Jeffery*, 1 Sim. & Stuart, 105. *Mason v. Thesiger*, id. 106.) Creditors have been permitted to come in under a decree upon a bill filed by legatees. That right was for a long time doubted. It was finally sanctioned from the necessity of the case; as the legatee could not be presumed to know who were creditors of the estate, or whether there were any such who ought to be made parties. That principle, however, cannot apply to this case; and there is no necessity of extending it further.

Bond v. Hendricks, 1 A. K. Marsh. 594. A stranger may on motion be admitted a defendant, on proof of interest, and the complainant must amend his bill accordingly. *Smith v. Evans*, 3 A. K. Marsh. 217. Amen to add proper parties are never too late while the court has control of the cause. *Parberry v. Goram*, 3 Bibb, 108. See *Waterman's A. Dig.* tit. PARTIES.

benefit of debtors who assign their property to pay confidential creditors, or to coerce their creditors to submit to their terms. If the debts paid by the complainant, and assigned to him, are not to be considered absolutely satisfied, so as to give the other creditors the right to the fund to the exclusion of those debts, upon which point it is not necessary *now to express any opinion, the bill at least should have been filed by the complainant in behalf of himself and all the other creditors who have a specific claim on the fund in the same right.

1830.

Ex parte
Johnson.

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The demurrer must be allowed ; with liberty to the complainant to amend his bill, on payment of costs, so as to bring all proper parties before the court.

EX PARTE JOHNSON.

A retaining fee is not allowed to a solicitor and counsel upon opposing a motion founded upon a petition for instructions to a receiver in the discharge of his duty.

Upon a denial of such an application the like costs must be taxed as are allowed for resisting a special motion.

Upon applications for commissions of lunacy and other proceedings of a like character, if a solicitor is actually employed to conduct the proceedings, he is entitled to a retaining fee.

But a retaining fee to counsel is only allowed where counsel is actually employed in a cause or suit strictly so called.

UPON a submission in this case by one of the taxing June 21st officers of certain questions in relation to costs.

THE CHANCELLOR decided that a retaining fee to solicitor and counsel was not allowable upon opposing a motion founded upon a petition for instructions to a receiver in the discharge of his duty. That like costs on a denial of the application must be taxed as are allowed for resisting a special motion. That on applications for commissions of

1880.
Camp
v.
Niagara B'k.

lunacy, and other special proceedings of a like nature where solicitors are actually employed to conduct the proceedings, a retaining fee ought to be allowed to the solicitor. But that retaining fees to counsel are only allowed where counsel are actually employed in a cause or strictly so called, in which there are adverse proceedings, or where there is a complainant and a defendant.

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*CAMP v. THE RECEIVERS OF THE NIAGARA BANK.

Where a suit had been commenced at law by the Bank of Niagara prior to its insolvency, and the receivers of the bank after their appointment elect to proceed with the suit, and upon the trial the plaintiffs were nonsuited, it was held that the defendant was entitled to his costs of suit, down to and including the entering of the nonsuit, out of the fund in the hands of the receivers.

July 6th.

THIS was an application for an order requiring the receivers to pay the costs of a suit at law prosecuted in the name of the President, Directors, and Company of the Bank of Niagara against the petitioners, and in which the plaintiffs were nonsuited at the trial.

D. Tillinghast, for the petitioner.

M. Chittenden, for the receivers.

THE CHANCELLOR. Although the suit against the petitioner was commenced under the direction of the officers of the bank and was at issue before the appointment of the receivers, yet as the receivers elected to go on with that suit for the benefit of the fund, it is equitable that they should pay the whole previous costs, as well as those which accrued after they assumed the control of the suit (*Masse v. Gillelan*, 1 Paige, 644.) If the receivers do not think it for the interest of the creditors to run the risk

having the costs charged upon the fund, they should have abandoned the suit, and then the petitioner would only have been entitled to share rateably with the other creditors. The petitioner is entitled to his costs, down to the time of the nonsuit, to be paid out of the fund in the hands of the receivers, unless they have some legal claim to offset. For the purpose of this application, I must presume the nonsuit was right; and that the claim for which that suit was brought was actually barred by the statute of limitations. The petitioner is not entitled to the costs of making up the record and issuing an execution against the bank. That was an unnecessary and *useless expense. He knew that the company was insolvent, and that all its property of every description was in the hands of officers of this court. Any attempt to enforce the collection of the costs by execution against the property in the hands of the receivers would have been punishable as a contempt.

1830.

Aymer
v.
Gault

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An order must be entered authorizing and directing the receivers to pay the costs of the petitioner, down to and including the entering of the nonsuit, out of the funds in their hands; but, under the circumstances, he is not entitled to the costs of this application.

B. AND J. Q. AYMER v. GAULT AND M'NAMARA.

Where a bill of interpleader is properly filed, the complainant is entitled to his costs out of the fund.

In suits pending at the time the revised statutes went into operation, the rights of the parties remain unaltered; but the remedy must be pursued according to such statutes, as far as is possible without impairing the right.

Where the defendants in a suit are not personally served with process and do not appear, a reference must be made to a master to take proof of the facts and circumstances stated in the bill before a decree can be made.

1830. Where a bill of interpleader is filed against two defendants, and one of them is not personally served with process and does not appear, the bill is taken as confessed against him, the defendant who appears will not be entitled to the possession of the fund until the expiration of the time limited by the statute for the other defendant to appear, unless he gives security to re-pay the fund in case the other defendant appears and establishes his right to the same.

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v.
Gault.

July 6th.

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THIS was a bill of interpleader filed against the defendants to compel them to litigate and settle their claims of \$1000 left in the hands of the complainants, for which the following receipt was given: "Received from Peter M'Namara, of the city of St. Johns, New Brunswick, one thousand dollars, to satisfy any legal claims that I, Archibald Gault, of the said city, may have against the said Peter M'Namara. And if any difficulty should arise between the said parties, they are to leave their claims to the decision of Messrs. Crookshanks and Walker of the said city, or any other two persons said parties may appoint, and he will pay the said Peter M'Namara or his order the amount of \$1000, within twelve months from the date or sooner, if terminated to the satisfaction of said parties. New York, January 24th, 1828.

"*B. Aymer & Co.*"

The defendant Gault, who resides at New Brunswick, wrote to the complainants, in March and May, 1828, informing them that M'Namara refused to submit the claim to arbitrators as specified in the receipt, and requesting the complainants not to pay over the money to him until their accounts were adjusted. After the expiration of the twelve months mentioned in the receipt, M'Namara insisted upon his right to the \$1000; and the claims of Gault remaining unadjusted, the complainants filed this bill to enable them to pay over the money to the party entitled thereto, and to be indemnified against the claim of both. M'Namara put in an answer denying all indebtedness to Gault, and claiming the money in the hands of the complainants. Gault being a non-resident, the bill

was taken as confessed against him, in February, 1830, for want of his appearance in pursuance of an order made in May of the preceding year, and published in the usual manner. The cause was submitted on pleadings and proofs as against M'Namara.

1830.

Aymer
v.
Gault

D. Lord, junior, for the complainants.

C. O'Connor, for the defendant M'Namara.

THE CHANCELLOR. The bill in this case is properly filed, and the complainants are entitled to their costs out of the fund. They were strictly stake holders, and could not with safety have paid this money to either of the defendants. They have acted with perfect good faith, and are entitled to the protection of this court. If the bill had been taken as confessed against Gault on a personal service of the subpœna, or before the revised statutes went into operation, it would have been a matter of course to decree the fund to the other defendant, with costs over against Gault. Such will still be the decree, after complying with certain formalities required by the revised statutes, if the facts stated in the complainant's bill are established before a master. In suits which were pending at the time the revised laws took effect, the rights of the parties must remain as they then existed; but the remedy, so far as relates to the practice of the court and the manner of ascertaining that right, must be according to the new law, as far as the proceedings can be made conformable thereto without impairing the right. (4 Wendell's R. 206, 220, 211.) In the case of absentees, by the former practice of the court the bill taken as confessed for want of an appearance was considered as conclusive against them, unless they came in and answered within the time limited by the statute. The legislature have now interposed further guards for their protection; not to alter the rights of the complainant but to preserve and protect

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1830. the rights of the absentees if any such rights exist.
 Aymer 126.h section of the article of the revised statutes,
 v. relates to proceedings in this court against absent
 Gault. cealed, or non-resident defendants who are not per-
 served with process and who do not appear, makes
 duty of the court to direct a reference to a master, to
 proof of the facts and circumstances stated in the
 before any decree can be made. In this particular
 it probably will be mere form, as the real grounds of
 gation, if any such exist in this case, are between the
 defendants. And the rights of the defendants as bet-
 themselves cannot be settled under that order of re-
 fence. All that can be inquired into under this order
 to the matters stated in the bill, and which are neces-
 to show that it was properly filed as a bill of interple.
 If the bill was properly filed, the defendant who has
 appeared will be entitled to possession of the fund after
 deducting the complainants' costs; but under the equi-
 construction of the 131st and 132d sections of that ar-
 of the revised statutes, he will be obliged to give secu-
 to refund in case the other defendant appears and is
 mitted to defend; and in default of giving such secu-
 the fund must remain in court until the expiration of
 time limited by the statute, unless the rights of the
 parties are sooner ascertained.

[*287] There must be a reference to a master to take pro-
 the facts and circumstances stated in the complain-
 bill, *so far as respects their right to file the bill of in-
 tervener against the defendant Gault; with liberty to
 master to examine the complainants on oath in relation
 the facts stated therein. On coming in of the report
 may be presented to the court on any regular motion
 for a final decree thereon.

1830.

Vanderheyden

v.

Vanderheyden

VANDERHEYDEN v. VANDERHEYDEN.

An executor or guardian may employ a clerk or agent and charge the estate with the expense, where, from the peculiar nature or situation of the property, the services of such clerk or agent will be beneficial to the estate.

But for his own services, the executor or guardian must be confined to the allowance by way of commissions as fixed by law.

In stating the account of an executor or guardian, if the court makes annual rests for the purpose of charging him with interest on the annual balances remaining in his hands, his commissions on the amount received, and actually disbursed during each year, may be deducted at each annual rest.

So far as the receipts and disbursements are actually off-set against each other, it is an annual settlement of the account so as to authorize the deduction of the commissions at the time of such settlement.

This case came before the court on exceptions to the master's report, on stating an account against the administratrix of the guardian of the complainant. The guardian had used moneys belonging to the infant, and the master in stating the account made annual rests for the purpose of charging the guardian with interest on these moneys. The expenditures of each year were less than \$1000, and the master at each annual rest deducted five per cent. on so much of the receipts as had been actually disbursed for the benefit of the infant during the year. And at the close of the account he credited the defendant with the commissions, at the rate of five per cent. of the first \$1000 of the balance, and at the rate of two and a half per cent. on the residue, according to the allowance settled by the court, in the matter of *Roberts*, (3 John. Ch. Rep. 43.) The defendant insisted before the master that commissions to the full amount of the moneys received by the guardian during the year should be allowed and deducted at each annual rest; and that she, the defendant, was also entitled to an allowance for the time and services of the guardian in attending to the superin-

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1880. tendence of the infant's property, over and above
 Vanderheyden commissions for collecting and receiving the rents
 v. Vanderheyden profits of the estate. The master having decided against
 the defendant on these questions, she excepted to
 report.

Geo. R. Davis, for the complainant.

J. P. Cushman, for the defendant.

THE CHANCELLOR. The question under the second
 ception is no longer open for discussion in this court.
McWhorter v. Benson, (1 Hopk. Rep. 28,) Chancellor
 Sanford examined this question and decided that the ex-
 ecutor or guardian was entitled to all proper expenses
 which he had been subjected in the care and management
 of the estate; and that he might employ an agent
 clerk, and charge the estate with the expense, where
 from the peculiar situation of the property or from
 nature, it was beneficial for the estate to subject it to the
 extra expense. But the executor or guardian, for his own
 services, must be confined to the allowance at a fixed
 rate, by way of commission on the moneys received and
 disbursed, as settled by the court, in full for all his ser-
 vices in discharge of the trust. This exposition of the
 former law is now adopted and sanctioned by the leg-
 islature in the recent revision of the statutes. (2 R. S. c.
 § 58; id. 153, § 22; Revisor's note to § 54, tit. 3, ch-
 pt. 2.)

I think the master was right in allowing commissions
 be deducted at the annual rests, only to the extent of the
 moneys which had been received and actually disbursed
 within the year. In the case mentioned by Hoffman
 (*Hedges v. Ricker*, Hoff. Prac. 180,) the master refused
 to allow the per centage on each sum received and paid
 out, but allowed it only upon the general aggregate. Against
 this decision of the master was sanctioned by the court.

an appeal from his decision. The only doubt in this case is whether the master has not allowed too much, by deducting five per cent. on the annual receipts and disbursements, and also the five per cent. on the first \$1000 the final balance. I think, however, that has been correctly allowed in this case; because the making of the annual rests for the purpose of charging the defendant with interest on the balance is, in fact, an annual settlement of the account. As the court settles the account annually, so far as the trust fund has been disbursed, for the purpose of charging the defendant with interest, it is proper to consider it settled to the same extent for the purpose of deducting the commissions on the receipts and disbursements which have been offset against each other in that settlement.[1]

The exceptions are overruled, and the report of the master is confirmed.

[1] Executors and administrators are entitled to a reasonable compensation for their trouble, and the expenses of administration. *Carroll v. Macell*, 2 J. J. Marsh. 205. An executor or administrator is not allowed commissions for those years he fails to render correct accounts to the ordinary. *Wright v. Wright*, 2 McCord's Ch. Rep. 195. If money is need out at interest, the executor is entitled to commissions on paying it away, and whether he places it in the hands of others, or keeps it in his own, makes no difference so it is paid. *Ib.* The executors were not allowed credit of ten per cent. on the debts of the estate paid by them to an attorney for his services in collecting the debts and paying over the moneys. *Edmonds v. Crenshaw*, Harp. Eq. 224. A commission of more than five per cent. on the amount of sales and collections, ought not to be allowed to an executor, except under peculiar circumstances. *Tripletts v. Jameson*, 2 Munf. 242. An executor may reasonably be allowed commission of ten per cent. on moneys received by him where the debts are very small and numerous, and the debtors presumed to have been very much dispersed. *Cavendish v. Fleming*, 3 Munf. 198. Five per cent. commission allowed the administrator, not on the receipts, but on the actual disbursements. *Webb's Heirs v. Webb's Adm'r.*, 6 Monroe, 166. In a suit for contribution, one of the administrators presented a large claim never before admitted, for visiting his brother, the intestate, and directing his affairs personally, not long before his death; such a claim, so presented, was wholly disallowed in toto. *Jackson's Adm'r. v. Moore and wife*, 8 Dana, 1830.

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There is no universal rule for fixing the compensation to executors;

1830. five per cent. on moneys received and paid out, is generally an appropriate allowance. In some extraordinary cases, additional charges for expenses per diem, attendance, &c., may be proper; but such charges should be moderate and should be rigidly scrutinized, and allowed only when extraordinary services have been required—of which satisfactory evidence should be furnished by the executor; the running up of accounts for attending courts, magistrates' trials, &c., is not to be encouraged. *Beeler v. Hill's Ex'rs*, 5 Dana, 42. An executor ought not to be allowed a credit for paying a debt of his testator, appearing on the face of the written instrument intended to secure it, to have been for money won at unlawful gaming. *Carter v. Cutting*, 5 Munf. 233. Although under peculiar circumstances, an allowance may be made to executors, in addition to the commissions given to attorneys for collecting debts confided to them, such additional commission ought not, in general, to be allowed, where the debtors reside in or near the neighborhood of the executor; who consequently might collect the moneys themselves. *Ib.* A settlement of an executor's administration account, certified by commissioners on a day subsequent to his death, and not appearing to have been made in his life time with notice to himself, nor after his death with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd v. Kaufmans*, 6 Munf. 45. The rule that where a party relies on an account furnished by the other party, and claims the benefit of credits, he is bound to take it all together, and admit the debts also, unless he can falsify and surcharge it by proofs, is not applicable to an executor's account. *Robertson v. Archer*, 5 Randolph, 319. A settlement made by an administrator with commissioners appointed by an order of the county court, is in no way binding upon the next of kin. *Wood v. Barringer*, 1 Dev. Eq. 67. See *Waterman's Am. Ch. Dig. tit. EXECUTORS AND ADMINISTRATORS.*

WARD v. VAN BOKKELEN AND OTHERS.

Where there is an absolute assignment of a chose in action, and the assignor claims no interest therein, he is not a necessary party to a bill filed to recover the amount due.

The assignee of a chose in action is now considered the real party to the suit, as well at law as in equity; and the defendant may plead and give in evidence any matter of defence which exists in his favor against the assignee.

A fair and bona fide purchase of a chose in action in the ordinary course of trade or business, or for the purpose of securing an antecedent debt, is not unlawful.

But the purchase of a mere foundation of an action by a party who has no interest in the controversy, with the express object of commencing a suit thereon, and for the purpose of harassing the defendant or of speculating out of the litigation, is illegal; and a court of equity will not sustain a suit in favor of such purchaser.

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Where property has been fraudulently conveyed by an insolvent debtor who afterwards obtains his discharge under the act, his interest in the property passes to his assignees for the benefit of his creditors, although such property is not embraced in the inventory.

In January, 1807, Samuel Beebe filed a bill in this court against Thomas Post, and the second of November thereafter obtained a decree against Post for \$3290.98, together with his costs to be taxed. At the time that decree was entered, Post was the owner of considerable real estate in the city of New York, which, on the 11th of November, 1807, he conveyed to his mother-in-law, Elizabeth Morris. Shortly after this conveyance, Post applied for a discharge under the insolvent act, (three fourth act;) and in November, 1808, upon making an assignment of all his estate, agreeably to the provisions of that act, he was discharged by the recorder of New York. In 1811, Mrs. Morris obtained from the corporation of New York a grant of the water lots in front of the lands conveyed to her by Post. In 1820, she borrowed money from the Fulton Fire Insurance Company to pay for the expense of filling in the water lots, and she gave the company a mortgage on the lots as security for the money loaned. She afterwards mortgaged the rear lots, which were conveyed to her by Post, to the New York Insurance Company to secure a loan made by her from that company. Post died in 1815, intestate, and without leaving any property. In 1822, Beebe also died intestate. Mrs. Morris continued in possession of the property until her death, in April, 1823. By her will she directed her executors to sell this portion of her real estate, and to pay off the incumbrances out of the proceeds of the sales. The residue of the purchase money, after paying her debts and a few specific legacies, she di-

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1880. rector to be divided between her four daughters. After
 Ward the death of Mrs. Morris, the mortgages to the two in-
 v. surance companies were foreclosed, and most of the
 Van Bokkelen. property was sold under the decrees of foreclosure. After
 paying the mortgage moneys with interest and costs out
 of the proceeds of such sales, a large surplus remained.
 In October, 1823, Kenneth H. Fish, described in the
 letters testamentary as a friend of S. Beebe, administered
 on his estate, and for the consideration of \$100 assigned
 the decree against Thomas Post to the complainant. The
 complainant afterwards, in May, 1825, filed his bill in
 this cause against the executors and devisees of Mrs.
 Morris, charging in said bill that the conveyances of
 November, 1807, from Post to her were fraudulent and
 void; and that they were made for the purpose of pre-
 venting Beebe from obtaining satisfaction of his decree
 by a sale of the premises. And the complainant prayed
 that the conveyances to Mrs. Morris might be declared
 fraudulent and void; that the premises might also be de-
 clared to *have belonged to Thomas Post at the time of
 his death; and that the complainant might be adjudged
 and decreed to be entitled to an execution upon the de-
 cree so assigned to him against the lands remaining un-
 sold, and that the surplus moneys raised on the mortgage
 sales might be applied towards satisfying that decree.
 The complainant also prayed for an injunction, and for
 general relief. The defendant Mary Post suffered the
 bill to be taken as confessed against her. The defendants
 Van Bokkelen and wife, Sarah Morris and Ann Morris,
 the three latter being the daughters of Mrs. Morris and
 executors of her will, put in their answer denying all
 knowledge and belief that the conveyances to Mrs. Mor-
 ris were fraudulent, and alleging that they were made to
 secure and pay a just debt due from Post to their mother.
 These defendants further insisted by their answer, that if
 any assignment of Beebe's decree had been made to the
 complainant. it was made for a small or nominal con-

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consideration at the instance of their sister and co-defendant Mary Post, the widow of Thomas Post, and with the sole view of harassing and disturbing them in their title to the property under the will of their mother. The cause was heard on pleadings and proofs as to these defendants.

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W. T. McCoun and *G. Griffin*, for complainant. The deeds from Post to Mrs. Morris were fraudulent and void, being given with intent to defraud creditors. There is no evidence that Mrs. Morris paid any consideration for these deeds. She had no means out of which to make such payment. And there is no evidence of any antecedent debt due her from Post, or that the premises in question were conveyed to her in satisfaction of, or as security for such debt. After the deeds were executed, Post continued to receive the rents and profits of the premises. These deeds were evidently given with intent to defeat creditors; if so, it is immaterial whether a valuable consideration was paid or not. Post intended to defeat the recovery of Beebe's decree, and Mrs. Morris by purchasing with a knowledge of this decree is implicated in the fraud. Whenever a purchaser buys with intent to defeat a judgment, already recovered or *about to be recovered, the deed to him will be void. And where there is an outstanding judgment, and the purchaser does not pay the full value of the premises, the law will imply that he agreed to pay the judgment. To constitute a bona fide purchaser, it must be shown that he had actually paid the purchase money before notice, and had not merely secured it to be paid. A party will be charged with notice where he acts in the face of facts and circumstances which were sufficient to put him upon inquiry. (Sugden's Law of Vendors, 490, 1. *Beals v. Guernsey*, 8 John. R. 52, 446. *Anderson v. Roberts*, 18 John. R. 515. *Anderson v. Van Alen*, 12 John. R. 345. *Sterry v. Arden*, 1 John. Ch. R. 267. *Jewett v. Palmer*, 7 John. Ch. R. 65. *Briscoe v. Clarke*, 1 Randolph's R. 213. *Alden v. Gregory*, 2 Eden's R.

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1830. 285, per Ld. Ch. Northington. *Jackson v. Myers*, 18 John. R. 425. *Wickham v. Miller*, 12 John. R. 320, 4. *Ward v. Van Bokkelen. son v. Mather*, 7 Cowen's R. 301. *Jackson v. Terry*, 18 John. R. 471.) Undocketed judgments will bind a chaser with notice. A decree is equal to a judgment docketed. (*Harvey v. Montague*, 1 Vernon, 57. 2 Cl 48. *Davis v. The Earl of Strathmore*, 16 Ves. R. 428.) It was not necessary to show in the bill the execution had been issued upon the decree. A decree is not like a judgment at law, where it is incumbent on the creditor to exhaust his remedy at law before he comes into chancery. It is incidental to the power of this court to defeat schemes to defraud decree creditors. And it is sufficient to give this court jurisdiction that there is a cloud upon the title. But it appears by the answer that an execution was issued upon the decree. The objection that no execution was issued can only be raised where the party puts himself alone upon the fact of issuing the execution. Here we put ourselves upon the fraud, which is always a ground of relief in this court. It was not necessary to make the assignees of Post parties. Not on all the debts signed off accrued subsequent to the execution of the fraudulent deeds; if so, the assignees have an interest, provided they had notice of the deeds. But it does not appear, either in the bill or answer, that there were any assignees. And besides, this objection of want of proper parties can only be taken advantage of by demurrer. The court cannot take notice of the consideration of the assignment to the complainant. The chase of the decree was like the ordinary case of buying a debt for less than the amount due.

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W. Slosson, for defendants. The complainant relies upon the strength of his own case; and not having shown the issuing of an execution, so as to give him a specific lien on the land, previous to the filing of the bill, he cannot succeed. (*Brinkerhoff v. Brown*, 4 John. Ch

671. *Williams v. Brown*, 4 id. 682. *McDermutt v. Strong*, 4 id. 687. *Hadden v. Spader*, 20 John. R. 554. *Beck v. Burdett*, 1 Paige's R. 305.) Decrees in chancery are not liens upon real estate, unless the proceeding is in rem, and then the filing of the bill produces the lien. The lien, in ordinary cases, is created by pursuing the decree to an execution and a levy. An execution out of chancery is a modern proceeding. It is a creature of the statute, and it produces no lien until an actual levy. The statement in the answer as to the issuing of the execution cannot aid the complainant. He must recover upon the case made in his bill, and not upon the admissions in the answer, nor even upon the proofs taken. (*James v. McKernon*, 6 John. R. 548. *Gouverneur v. Elmendorf*, 5 John. Ch. R. 79.) If the complainant had no lien upon the premises, the interest of Post passed to his assignees, and there is a defect of parties. If this objection cannot be raised upon the pleadings, then it is incumbent upon the defendants to object that the legal representatives of Post have not been made parties. The assignment of the decree to the complainant was maintenance at common law. It was the purchase of a contested debt, not to secure creditors, but to benefit strangers. (*Stevens v. Bagwell*, 15 Ves. 140. *Wood v. Downes*, 18 Ves. 125. *Strachan v. Brander*, 1 Eden's R. 303. *Arden v. Patterson*, 5 John. Ch. R. 44. *Powell v. Knowler*, 2 Atk. 226. *Wallis v. Duke of Portland*, 3 Ves. jr. 494. *Reigal v. Wood*, 1 John. Ch. R. 402.) Here was at least such a gross abuse of duty on the part of the complainant as not to entitle him to relief. He paid a mere nominal consideration for the decree; and he appears here in the *character of a depredator upon orphans, a mere volunteer in a scheme of iniquity. In such cases, the court always refuses to interfere. Mrs. Morris was a creditor of Post, and had a perfect right to take a conveyance of his real estate to secure her debt. Her case was different from that of a mere volunteer purchaser. A creditor may take an as-

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signment of property from his debtor to secure his debt although the debtor at the time avows that his intention is to defraud his other creditors. A debtor may prefer one creditor to another ; and a bona fide purchaser for a valuable consideration from a fraudulent grantor, without notice of the fraud, cannot be disturbed in his purchase. Mrs. Morris had no notice of the fraudulent intention of Post. (*Moran v. Dawes*, 1 Hopk. R. 365. *Wiggins v. Armstrong*, 2 John. Ch. R. 144. *Phoenix v. The Assignees of Ingraham*, 5 John. R. 417. *Wilder v. Winne*, 6 Cowen's R. 284.) Mrs. Morris took these conveyances from Post with no other view than to secure her debt against him. There was no fraudulent intention on her part. The decision of the recorder against the alleged fraud, after a lapse of 20 years, is overwhelming in its nature. After such a lapse of time, the presumptions are against the fraud. (*Morse v. Royal*, 12 Ves. 377, 8. *Underwood v. Lord Courtown*, 2 Sch. & Lef. 41. *Pickering v. Lord Stamford*, 2 Ves. jr. 583.)

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THE CHANCELLOR. If the transactions to which the pleadings and proofs in this case relate were of recent occurrence, the weight of testimony would certainly be against the validity of the conveyances of November, 1807. There is certainly much reason to suspect that the property was conveyed to Mrs. Morris for the purpose of defrauding Beebe of his debt. But considering the staleness of the transaction, the fact that an investigation took place before the recorder a few months after the conveyance of the property, and the extraordinary circumstances under which this claim is now brought forward, if the decision of the cause turned upon the question of fraud alone, I should not think myself warranted in setting aside the conveyances without giving the defendants an opportunity to examine the witness openly in the presence of a jury. Before a feigned issue can be directed to try the question of fraud, it becomes necessary to examine some

of the other points raised by the pleadings and proofs in this cause, for the purpose of ascertaining whether the establishment of the fraud will entitle the complainant to the relief asked for here.

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It is objected, among other things, that the assignment of the decree to the complainant was void, on the ground of champerty; and that the assignor should have been a party to the suit. By the ancient practice of the English court of chancery there is no doubt that the assignor of a chose in action was a necessary party to a bill to recover the amount. And as late as 1792, in the case of *Cathcart v. Lewis*, (1 Ves. jun. 463,) Lord Thurlow allowed a demurrer to a bill filed by the assignee of a judgment, because the assignor was not made a party. Though some years previous to that time Lord Hardwick had declared it was not necessary in every case to make the assignor a party, where all the equitable interest had been assigned. (*Brace v. Harrington*, 2 Atk. 234.) In 1802, in the court of errors of this state, there was a difference of opinion among some of the judges as to the necessity of making the assignor of a mortgage a party to a bill of foreclosure brought by the assignee. (*Johnson v. Hart*, 3 John. Ca. 322.) But at this day the rule is well settled that where there has been an absolute assignment of all the interest of the mortgagee in the debt secured by the mortgage, he is not a necessary party to a bill to redeem, or to a bill of foreclosure. (*Chambers v. Goldwin*, 9 Ves. 269. *Newman v. Chapman*, 2 Rand. Rep. 93. *Whitney v. M'Kinney*, 7 John. Ch. R. 144.) The reason why it was formerly considered necessary to make the assignor of a chose in action a party to a bill in equity brought by the assignee, I apprehend, must have been that courts of law did not sanction and protect such assignments; considering them a species of maintenance. And the assignor having the legal title or interest in the thing assigned, he might sustain an action at law thereon, notwithstanding a decree in equity to which he was not a party. This reason has long

1830. since ceased, as it is now well settled, at least in this state,
 Ward that after an absolute *assignment of a chose in action,
 v. the assignee, at law as well as in equity, is considered the
 VanBokkelen. real party to the suit; and the defendant may plead and
 give in evidence any matter of defence which exists in his
 favor against the assignee.[1] A decree in equity between

[1] Many things are assignable in equity, which the common law does not permit. A possibility, or a contingent interest, is assignable. *Breckenridge v. Churchill*, 3 J. J. Marshall, 13. And a chose in action is assignable in equity. *Ib.* So, also, is the right to reclaim usury. *Ib.* In equity all things involved in a contract are assignable. A possibility or contingent interest is assignable in equity. *Breckenridge v. Churchill*, 3 J. J. Marsh. 13. But the court left it undecided whether, by the assignment of a note for the purchase money of lands, the lien of the vendor of the lands passed to the assignee. *Ormsby v. Tarascon*, 3 Little's Rep. 404. But a penal bond, with a condition to convey land to the obligee, or his appointee, may be assigned after forfeiture, and the assignee may maintain a bill in equity for specific performance. The obligor cannot question the validity of such assignment, on the ground that it was made without consideration. *Ensign v. Kellogg*, 4 Pick. Rep. 1. A vested right of the wife may be effectually assigned by the husband, but her contingent interest will survive to her against his assignee, even though the assignment was made for a valuable consideration, and with her concurrence. *Terry v. Brunson*, Richardson's Eq. Rep. 79. A contingent remainder is not subject to the lien of a judgment; but the assignment of it for a valuable consideration will be supported in equity, and especially enforced as an agreement; therefore, where the remainderman, against whom there were judgments before the contingency on which he took happened, assigned his interest, it was held that the lien of the judgments must be subject to the equity of the assignment. *Allatons v. The Bank*, 2 Hill, 242. A chose in action may be assigned by an insolvent debtor for the benefit of his creditors, as, for instance, a policy of insurance; and such assignment will entitle the assignee to recover from the underwriters the amount insured, in case of loss. *Spring v. S. Car. Ins. Co.*, 8 Wheat. 268, 282. A claim against a foreign government, for indemnity, on account of an illegal capture, is assignable in equity. *Couch v. Delaplaine*, 2 Comstock's Rep. 397. A bank may make an assignment of its effects for the payment of its debts; such assignments, whether made voluntarily, or by operation of law, have often been upheld. *Arthur v. Comm. & R. R. Bank of Vicksburg*, 9 Smedes & Marshall's Rep. 394. (Vide 4 Hump. 403. 14 Con. 594. 6 Gill & Johna. 363. 6 S. & M. 513.) A man can pass by assignment or grant only that which he now possesses, and which is in existence at the time, either actually or potentially. *Woodworth v. Sherman*, 3 Story's Rep. 174.

the defendant and the assignee would now have the same effect in court of law as if the assignor was a party to such a decree; the fact of the assignment being first established. In *Cobb v. Thompson*, (1 Marsh. Kent. R. 508,) the assignee of a judgment was permitted to file a bill in chancery, in his own name, without making the personal representative of the assignor a party. If there was any controversy between the assignor and the assignee in relation to the fact of the assignment, or as to the right of the latter to the chose in action, this court, in the exercise of a sound discretion, might require the assignor to be made a party, so that both might be bound by the decree. But in a case like the present, where there is an absolute assignment in writing, and where there is nothing in the

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Mitchell v. Winslow, (in bankruptcy,) 2 Story's Rep. 630. Unless he uses language importing an intention to grant what he does not now possess, and what is not now in existence. *Woodworth v. Sherman*, 3 Story's Rep. 174. And in such case there is not strictly an assignment or grant, but only a covenant or contract, which a court of equity will carry into effect, when the right or thing comes in esse. *Woodworth v. Sherman*, 3 Story's Rep. 174. *Mitchell v. Winslow*, (in bankruptcy,) 2 Story's Rep. 639. A mere possibility is not assignable at law. *Mitchell v. Winslow*, (in bankruptcy,) 2 Story's Rep. 630. But courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present potential existence, but rest in mere possibility only. *Ib.* An equitable claim which cannot be enforced at law, e. g. as against the government of the United States, or a foreign government, but existing at the time of the assignment, and afterwards realized, passes to the assignee. *Milnor et al. v. Metz*, 16 Peter's, 221. So, where M., being a gauger in the service of the United States, receiving the salary allowed by law, performed extra services for which compensation was not provided, was discharged under the insolvent laws of Pennsylvania, after having made, according to the requirements of the law, an assignment of "all his estate, property and effects, for the benefit of his creditors;" and after his discharge presented a petition to Congress for a compensation for the extra services performed by him as gauger, before his discharge by the insolvent law, and Congress passed an act giving him a sum of money for those extra services; it was held, that the assignee under the insolvent law was entitled to receive from the treasury of the United States the amount so allowed. *Ib.* See *Watman's Am. Ch. Dig.* vol. 1, tit. ASSIGNMENT.

1880. pleadings or proofs to induce a belief that the assignor had not parted with all his interest in the subject matter of the suit, it would be an unnecessary and useless expense to make him a party.

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The question as to the legality of the assignment in the case is not so clear. There can be no doubt of the fact that the assignment was obtained for the express purpose of commencing a suit, to endeavor to set aside the conveyances to Mrs. Morris on the ground of the alleged fraud. There was no longer any hope of obtaining anything on account of that decree except by a litigated suit. Post was discharged under the insolvent act, and had died insolvent many years before. The purchase of this alleged claim was undoubtedly made for the benefit of Mary Post, one of the defendants; and there was not the least possibility of recovering anything unless she could show that her mother had committed a fraud, and that her husband had been guilty of perjury. Neither the complainant nor herself had any claim against Beebe or representatives, and neither could have had any other possible motive for the purchase except to harass the defendants or to make money by the purchase of a lawsuit. The statute declares that no officer or other person shall take upon him any business that is or may be in suit in court to have a part of the thing in plea or demand; and no person upon any such agreement shall give up his right to another, and every such conveyance and agreement shall be void. (1 R. L. 172.) I am aware that this statute has been construed strictly; and that it does not extend to the fair and bona fide purchase of a chose in action in the ordinary course of trade or business, or for the purpose of securing or recovering payment of an antecedent debt (2 Sim. & Stu. 244. 2 Freeman's Rep. 145. 6 Dalt. Abr. 741, ch. 202, art. 9, § 3.) But if any state of facts can bring the purchase of a chose in action within the prohibition of the statute, this is a case of that description. The decree was no longer a personal claim against Post.

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or his property at large; but if it had any validity it was as against the lands then owned by the devisees of Mrs. Morris. It was strictly a purchase of the profits of a litigation; as to which the purchaser is not entitled to the aid of this court.

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Independent of this objection to the complainant's right of recovery, there is another which is equally fatal in this case. It appears by the answer of the defendants, and by the proofs in the cause, that shortly after the conveyances to Mrs. Morris, Post was discharged under the insolvent act and assigned all his property to A. L. Degrove for the benefit of his creditors. If the conveyances to Mrs. Morris were fraudulent, the whole of this property of the insolvent passed by that assignment to the assignee under the act, whether inventoried or not; and the assignee is a necessary party to the suit.

I am satisfied the complainant is not entitled to any relief in this case, and the bill must be dismissed with costs.

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If a defendant is absent from home and no person can be found at his place of abode, a subpoena may be served at his store or place of business by delivering the same to his clerk or servant.

An attachment had been issued in this cause against Parke for not appearing. He occupied a dwelling house and store at Whitehall. When the officer went to serve the subpoena he was absent from home, and there was no person at his dwelling house. The officer then went to his store and there served the subpoena upon his son. It was not denied by the defendant that the subpoena came to his knowledge. The only question raised was whether an attachment could be issued for a neglect to appear upon such a service of the subpoena. August 4th.

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J. Rhoades, for the complainant.

J. Williams, for the defendant.

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THE CHANCELLOR. The proper manner of serving a subpoena is by delivering it to the defendant personally, he can be found; or, in case of his absence, by leaving with his wife, or some member of his family of suitable age and discretion, at his place of abode. If the service cannot be made in either of these modes, it may be made by leaving the subpoena with the defendant's servant clerk at his place of business, which in such a case is equivalent to a service at his dwelling house. (1 Price R. 92. 3 Price's R. 176.) The 21st rule of this court does not exclude any other legal mode of service which will be as likely to bring home to the defendant knowledge of a subpoena. The statute having provided a mode of notifying defendants who are absent from the state, or concealed therein, the English practice of allowing a substituted service, by an application to the court, can only be adopted in very special cases. But service on the clerk or servant of a party at his usual place of business is never considered a substituted service; and no special order of the court is necessary to validate such a service.

Under the circumstances disclosed in the affidavit, a subpoena was duly served, and the attachment was regularly issued.

THE MECHANICS' BANK v. SNOWDEN.

Where a defendant gave notice of his intention to appeal from the decision of a vice chancellor on an interlocutory motion, and that he should be on the hearing of such appeal on the next motion day before the chancellor; and the complainant's counsel attended on that day to oppose the application, but no appeal was in fact entered, the defendant is charged with the costs of opposing.

The chancellor has jurisdiction to award such costs, although the case is not regularly before him by appeal.

THE defendant applied to the vice chancellor of the first circuit to set aside an order taking the bill in this cause as confessed; which was denied with costs. The defendant's solicitor then gave notice that he intended to appeal from that decision, and that he should bring on the hearing upon the appeal on the next motion day before the chancellor. The counsel for the complainant appeared on that day, but no appeal had in fact been entered. The only question was whether any and what costs the defendant was liable to pay.

1880.
Gouverneur
v.
Lynch.
August 24th.

B. F. Butler, for the complainants.

J. Rhodes, for the defendant.

THE CHANCELLOR. As no appeal has been actually entered, the complainants are not entitled to the usual costs on the affirmance of an order. But having been improperly brought here, the defendant must pay them the costs of appearing to oppose the hearing on the appeal. The chancellor has jurisdiction to award such costs, although there is no general jurisdiction in relation to the cause, which is not regularly before him. (*The People ex rel. Mallard v. The Judges of Madison County*, 7 Cowen, 423.)

*GOUVERNEUR v. LYNCH.

[*300]

Where lands belonging to several persons are covered by a mortgage given by the person from whom they derive their titles, the several parcels must be sold to satisfy the mortgage in the inverse order of their alienation. The first purchaser from the mortgagor has the prior equity, although the consideration was not actually paid until after other portions of the lands had been purchased and paid for. If a vendee is in possession of lands, under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity.

1830. If the purchase money has been paid by a vendee before a mortgage is recorded, the mortgagee will have no claim upon the land.
 Gouverneur v. Lynch. If a part of the purchase money remains unpaid at the time the mortgage is recorded, such mortgagee will have an equitable lien on the land to the extent of the unpaid purchase money.

August 24th. THIS was a bill of foreclosure. The defendant gave a mortgage upon a large tract of land, part of which was under contracts for sale previous to the date of the mortgage. The purchasers at the date of the mortgage were in possession and had paid considerable part of the purchase money. They have since paid the balance of the mortgage. Other parts of the lands were sold to various other persons who are made defendants in this suit.

A. McDonald, for the complainant.

J. Edwards and *J. McKown*, for the defendant.

THE CHANCELLOR. Where lands belonging to several persons are covered by a mortgage given by one of them from whom they all derive their titles, the land so mortgaged by him are first liable to satisfy the incumbrance. If several parcels must be sold by the master in discharge of the mortgage in order of their alienation. Where the purchase money has been paid in good faith, the first purchaser has an equity, although the consideration was not actually paid until after other portions of the lands had been sold and paid for by the vendee.

[*301] If a vendee is in possession of land, under a contract of purchase, a subsequent purchaser or mortgagee cannot give constructive notice of his equitable rights; and the land is not subject to his prior equity. (5 John Ch. Little's R. 317. 1 Munro's R. 201.) If the purchase money has been paid before notice of and prior to the date of a subsequent mortgage, the mortgagee will have no claim upon the land. Where a part remains unpaid

will have an equitable lien thereon to the extent of the unpaid purchase money.

1880.
Ontario Bank
v.
Strong.

The decree in this case must be drawn up in conformity to these principles; and if the lands not contracted for at the date of the mortgage are insufficient to pay the amount due to the complainant, with costs, the master must ascertain and report the amount of the purchase money which was due on the other lots at the time of the registry of the mortgage.



THE ONTARIO BANK v. STRONG AND OTHERS.

An order for the appearance of a non-resident infant defendant, must be obtained and published, or served in the same manner as in the case of adult defendants.

And if the infant does not appear by guardian within twenty days after the expiration of the time limited in the order, the complainant may apply to the court to appoint a guardian ad litem to appear and answer for such infant.

Where a bill filed by a corporation aggregate to foreclose a mortgage, is taken as confessed against an absentee, and a reference is made to a master to take proof of the facts and circumstances stated in the bill, it is proper under the revised statutes, (2 R.S. 187, sec. 128,) to examine the officers of the corporation, as to the payments which ought to be credited on the mortgage.

Where only a part of the mortgage debt is due, a decree for a sale will not be ordered until a reference has been made to a master and he has reported as to the situation of the mortgaged premises.

If the master upon such reference reports that a sale of the whole premises is necessary, he should give the reasons upon which his opinion is founded.

If he decides that the property may be sold in parcels, he should state in his report the relative situation and value of the several parcels, and what part of the premises ought to be first sold, and all other facts necessary to enable the court to make such order of sale as will be most beneficial to the parties.

This was a suit to foreclose a mortgage. Some of the August 26th defendants were absentees, and one of whom was an in-

1880. *Ontario Bank* v. *Strong*. fant. *On a former day, upon an application to a guardian for the non-resident infant, the chancellor decided that an order for the infant to appear must be obtained and published or served in the usual manner if the infant did not appear by guardian within a certain number of days after the expiration of the time limited in the bill. The complainants might then apply to the court for an appointment of a guardian ad litem to appear and defend for him.

The bill having been taken as confessed against the defendants, and those who were infants having given a general answer by their guardian, a reference was made to a master to examine and report as to the true facts stated in the complainant's bill and to compute the amount due upon the mortgage. The complainant was a corporation aggregate, their cashier and clerks were examined as to the payments which ought to be credited on the mortgage. The chancellor decided that this was the correct practice under the article of the revised statutes relative to proceedings against absent defendants. (S. 187, § 128.) But all the mortgage money not yet due, the question was now raised whether an order for sale could be made before a report was obtained as to the situation of the mortgaged premises.

N. W. Howell, for the complainants.

THE CHANCELLOR. By the 163d and 165th sections of the article of the revised statutes relative to the sale of mortgages in equity, (2 R. S. 193,) the legislature evidently intended that no decree for the sale of mortgaged premises should be made, where only a part of the debt had become due, until there had been a reference to a master and report as to the situation of the premises. In *v. Huffman*, (1 Paige's Rep. 648,) this court decided that in cases like the present, the complainant might obtain a common order of reference to ascertain the facts, or

sert a direction to the master to that effect, in the usual reference to compute the amount. If the master decides that a sale of the whole premises is necessary, he should state the reasons why that will be most beneficial to the parties. And if he decides that the property *may be sold in parcels, he should state the relative situation and value of the several parcels, and which should be first sold; or such other facts in relation to the property as will enable the court to act understandingly in making such an order of sale as will be most beneficial to the parties.

In this case there must be a further reference and report, as to this matter, before any decree for the sale can be entered.

1830.

Smith

v.

Kane.

[*303]

SMITH AND OTHERS v. KANE AND WIFE.

Where a debt due to the wife before marriage has never been reduced into possession by the husband, it is considered the property of the wife so as to be subject to her equity for the support of herself and children. If a creditor asks the aid of a court of chancery to reach property of the husband which is not subject to an execution at law, he must take such property subject to the wife's equity, if she has any therein.

The bill in this case was filed by certain judgment Sept. 7th. Creditors of Kane and Smith, who had proceeded to execution against them without obtaining satisfaction of their debts. Kane had been convicted of forgery, and sentenced to imprisonment in the state prison. The principal object of the bill was to reach certain moneys claimed by his wife, and an injunction had been obtained to prevent her from using the same for the support of herself and children. She having put in her separate answer, a motion was now made in her behalf to dissolve the injunction.

M. T. Reynolds, for the complainant.

Azor Taber, for Esther Kane.

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1880. THE CHANCELLOR. From the answer of the defendant
 Knickerbacker v. E. Kane, it satisfactorily appears that she has the equitable
 v. De Freest. right to the money in the hands of Alexander, for
 the support of herself and children. It was a debt due
 to the wife before her marriage with Kane, and he has
 never reduced it into possession. By the consent of her
 husband, and in pursuance of a verbal antenuptial con-
 tract, she has been permitted to preserve this small fund
 as her separate property. In such a case this court would
 [*304] not aid the husband in *obtaining this money from her or
 her depository; and his creditors or general assignees can
 have no greater equities. (*Hornsby v. Lee*, 2 Mad. Rep.
 16. *Gayner v. Wilkinson*, 2 Dick. 491. *Ex parte Beilby*,
 1 Glyn & Jam. 167. *Udall v. Kenney*, 3 Cowen, 590.)
 When an execution creditor comes into this court to reach
 property of the husband which is not subject to execu-
 tion at law, he must take it subject to the wife's equity,
 which she had a right to insist on as against her husband.
 The property in controversy here being wholly insuffi-
 cient for the support of the wife and her children, and
 she having the prior equity, the injunction must be dis-
 solved.

KNICKERBACKER v. DE FREEST AND OTHERS.

The court will not appoint a guardian ad litem for an infant defendant upon
 the nomination of the complainant.

If a guardian ad litem neglects his duty to the infant, whereby such infant
 sustains an injury, the guardian will not only be punished for his neglect,
 but he will also be liable to the infant for all damages he may have sus-
 tained.

It is the special duty of a guardian ad litem to submit to the court for its
 consideration and decision every question involving the rights of the
 infant affected by the suit.

When the complainant applies for the appointment of a guardian for an
 infant defendant under the last clause of the 144th rule, he will be en-
 titled to an order appointing such person guardian as shall then be de-
 signated by the court, unless the infant, within ten days after service

of a copy of such order, shall himself procure a guardian to be appointed.

1830

copy of such order may be served personally upon the infant if he is of the age of 14 years or upwards, and if he is under that age, then upon his general guardian, or his relative, friend, or other person with whom he resides.

Knickerback's
v.
De Fresat.

on the expiration of the ten days, upon filing an affidavit of the service of the order, and that no notice has been received of the appointment of a guardian ad litem by the infant, the complainant will be entitled to an order of course that the former order for the appointment of a guardian be made absolute.

partition causes, where security is required from the guardian, the order must require the infant to procure a guardian to be appointed, and that he file the requisite security within the ten days, or that an order for the appointment of the person named by the court will be made absolute upon his filing such security.

where the infant is a non-resident, special directions must be given as to the manner of service of the order, if any notice thereof shall be deemed requisite.

THIS was an application on the part of the complainant to appoint a guardian for an infant defendant. The defendant had neglected to appear, for twenty days after the time for appearing, as prescribed in the 22d rule, had expired; and a petition was thereupon presented to the court agreeably to the last section of the 144th rule, requesting that a particular person named in such petition should be appointed guardian.

[*205]

August 21st.

L. K. Kip, for the complainant.

THE CHANCELLOR. The court never selects a guardian ad litem for an infant defendant on the nomination of the adverse party. It is frequently necessary for the guardian to contest the complainant's claim. It is his duty in every case to ascertain from the infant and his friends, from other proper sources of information, what are the legal and equitable rights of his ward. And if a special reference is necessary, or advisable, for the purpose of bringing the rights of the infant properly before the court, it is his duty to put in such an answer. If the infant is a

1880. mere nominal party, or has no defence against the con-
 Knickerback'r plainant, and no equitable rights as against his co-defen-
 v. ants which render a special answer necessary, the gen-
 De Freest. eral answer will be sufficient. If the infant has any substan-
 tial rights which may be injuriously affected by the pro-
 ceedings in the cause, or if the claim against him is of a
 doubtful character, it is also the duty of his guardian ad
 litem to attend, before the court on the hearing, on the
 taking of testimony in the cause, on references to the
 master, and on all other proper occasions to bring for-
 ward and protect the rights of his ward. And if the
 guardian neglects his duty, in consequence of which the
 rights of the infant are not properly attended to, or are
 sacrificed, he may be punished for his neglect. He will
 also in such case be liable to the infant for all damages
 he may sustain. Although it is the duty of the court to
 protect the rights of infants, when they are properly be-
 fore it, so that they may be seen and fairly understood,
 yet it is the special duty of the guardian ad litem to bring
 those rights directly under the *consideration of the chan-
 cellor for his decision thereon. This being the duty of
 the guardian, it would be improper in any case to permit
 the complainant to name the person who is to resist his
 claim against the infant.

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The revised statutes have made provision for the ap-
 pointment of a guardian for an infant defendant in courts
 of common law, where he neglects to have one appointed
 for himself. (2 R. S. 447, § 10, 11.) It is therefore ad-
 visable that the proceedings in this court should conform
 to the spirit of those provisions. There a guardian is not
 to be appointed for an infant, on the application of the
 adverse party, until the infant defendant has been duly
 notified and required to procure one to be appointed for
 himself. When the complainant applies for the appoint-
 ment of a guardian for an infant defendant, under the last
 clause of the 144th rule, he will be entitled to an order
 appointing such person as shall then be designated by the

: guardian ad litem, unless the infant, within ten days service of a copy of such order, shall procure a guardian to be appointed for himself; and shall give notice thereof to the complainant. Such service may be made on the infant, or at his place of residence, in the same manner, if he is of the age of 14 years or upwards. If he is under that age it should be served on his general guardian, or on his relative, friend, or other person, with whom he resides. At the expiration of the ten days, on filing an affidavit of the service of the order, and that notice of the appointment of a guardian ad litem has been given, the complainant may have an order of course reversing the former order for the appointment of the guardian, and the order made by the court be made absolute.

1830:

Knickerbocker's

De Front

In partition causes, where security is required from the guardian, the order must require the infant to procure a guardian to be appointed and to file the requisite security within the ten days, or the order for the appointment of a person named by the court will be made absolute, on filing such security. Where the infant is a non-resident, special directions must be given by the court as to the manner of serving the order, if any notice thereof will be deemed requisite.

In this case James Porter is appointed guardian ad litem, if the infant defendant shall not procure one to be appointed for himself within ten days.[1]

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[No proceedings can be had against an infant after service of the subpoena, until a guardian has been appointed and has filed the requisite security. *Larkin v. Mann*, 2 Paige, 27. On a bill for a divorce, if the defendant is an infant, she must prosecute or defend by her next friend or guardian. *Wood v. Wood*, 2 Paige, 108. An order for the appearance of a non-resident infant defendant must be obtained and published, or served, in the same manner as in the case of adult defendants. And if the infant does not appear by guardian within twenty days after the expiration of the time fixed in the order, the complainant may apply to the court to appoint a guardian ad litem, to appear and answer for such infant. *Ontario Bank v. Wood*, 2 Paige, 301. The court will not appoint a guardian ad litem for an infant defendant, upon the nomination of the complainant. *Knicker-*

1830. *Knickerbacker v. De Freest*, 2 Paige, 304. When the complainant applies for appointment of a guardian for an infant defendant, under the last of the 144th rule of the court, he will be entitled to an order appointing such person guardian as shall then be designated by the court, unless the infant, within ten days after service of a copy of such order, shall present himself a guardian to be appointed. *Ib.* A copy of such order must be served personally upon the infant, if he is of the age of fourteen years or upward, and if he is under that age, then upon his general guardian, next of kin, friend, or other person with whom he resides. *Ib.* Upon the expiration of the ten days, upon filing an affidavit of the service of the order, and that no notice has been received of the appointment of a guardian ad litem by the infant, the complainant will be entitled to an order of the court that the former order for the appointment of a guardian be made absolute. *Ib.* The revised statutes of New York do not, in terms, require a next friend to be appointed for an infant plaintiff who joins with an adult plaintiff; it is as necessary in that case to have a next friend appointed as in the case of a sole plaintiff. The provision which directs the officer making the appointment of a next friend to take security to the infant, in certain cases, extends to cases where the infant sues jointly with others. *Matter of Frits*, 2 Paige, 374. Where a great number of infants, legateses, had a common interest in the prosecution of a suit, the court, on the application of the guardians of some of the infants, in behalf of all the infants, appointed a next friend to prosecute a suit in the names and for the benefit of all the infant legateses. *Ib.* It is unnecessary to bring the infant before the court, previous to appointing a guardian ad litem for him. *Banta v. Aloon*, 2 A. K. Marsh. 167. If a guardian be appointed, appears, and neglects to answer, the cause may notwithstanding be heard. *Ib.* It is not necessary if the guardian appears, that process should be served on the infant. 168. Where a deed of property, which ought to have been executed by the ancestor, and in which infant heirs have an interest, is directed to be executed, their guardian ad litem signs for them. *Van Schaick v. Stansant*, 2 Edwards, 204. Quære, whether a payment of a judgment or debt to a guardian ad litem is valid? *Miles v. Kaigler*, 10 Yerger, 10. A surrogate may appoint any suitable person to be guardian ad litem of an infant pending an application for the appointment of a general guardian. *Kellinger v. Roe*, 7 Paige, 362. Where the real estate of infants was under a judgment in partition, held by the court, that the guardian ad litem of the infants, and not their general guardian, was the proper person to receive and invest the money. *Cook v. Lee*, 6 Paige, 158. It is essential to the action of a guardian ad litem to minors interested in a cause, that a decree should be had appointing him such guardian; and the answer of a stranger, styling himself so, is not sufficient to avoid the necessity of a decree appointing him such. *Darrington et al. v. Borland*, 3 Porter, 3. A peremptory order obtained by the complainant, for the appointment of a guardian ad litem for infant defendants, is irregular, so far at least

protect the title of a purchaser under the decree in the suit in which such order is made. *Concklin v. Hall*, 2 Barb. Ch. Rep. 138. There is no unbending rule in practice in relation to the appointment of a guardian ad litem for an infant, upon the application of the complainant, where the infant, or his friends, neglect to procure the appointment of a guardian for him, within twenty days after the return day of the subpoena. *Ib.* The usual practice is to grant an order nisi, appointing some suitable person guardian ad litem, for the infant, unless the infant shall, within ten days after service of a copy of the order, procure the appointment of another person. *Ib.* It seems, however, it is correct practice, for the complainant to give notice to the infant, at the time of serving the subpoena, where he is of the age of fourteen years or upwards, or to his relative or protector, in whose presence the subpoena is served, where he is under that age, that if he does not procure the appointment of a guardian ad litem, within twenty days after the return day of the subpoena, the complainant will apply to the court to appoint a guardian for him, without further notice. *Ib.* In the case of infants who are absentees, it is a matter of course to make an absolute order for the appointment of a guardian ad litem for them, without further notice, where they, or their friends, do not procure a guardian to be appointed within twenty days after the expiration of the time limited in the order for their appearance. *Ib.* Where, after a decree containing liberty to apply, there is an accession of new parties in interest, on a petition to the court, a guardian ad litem for the infant new parties will be appointed ex parte, to represent them on the petition and hearing. *Butler v. Halsey*, 4 Sandf. Ch. Rep. 354. Where a person consents to act as a guardian ad litem, he must put in a pleading, and is not to stop the complainant by neglecting it merely because he thinks his wards are improper or unnecessary parties. *Farmers' Loan and Trust Co. v. Reid*, 3 Edw. Ch. Rep. 414. Minors, defendants in chancery, having been admitted to make full defence by the natural guardian, the revising court will consider the sanction given to such mode of defence as equivalent to an appointment of a guardian ad litem. *Cato v. Easley*, 2 Stewart, 214. If a guardian ad litem neglects his duty to the infant, whereby such infant sustains an injury, the guardian will not only be punished for neglect, but will also be liable to the infant for all the damages which he may have sustained. *Knickerbocker v. De Freest*, 2 Paige, 304.

1830.
Fulton Bank
v.
Beach.

THE FULTON BANK v. EBENEZER S. BEACH AND OTHERS.

Where, in a suit against 12 defendants, an answer was put in and filed, purporting to be the joint and several answer of all, but was in fact not signed or sworn to by one of the defendants, and after a replication was

1830.
Fulton Bank
 v.
 Beach.

filed, proofs taken, the cause set down for hearing, a motion for re-examination of a witness, a denial of the same, an appeal from such decision, and a motion for leave to file a supplemental answer, a separate answer was filed without leave of the court by the defendant who had been joined in the original answer, setting forth substantially the same defenses asked to be allowed to be set forth in the supplemental answer. It was held that the separate answer was filed irregularly, and directed to be taken off the files of the court.

It seems that where the parties agree that an answer may be put in without oath or signature, it is of course for the court so to order.

An answer should regularly be signed and sworn to, but the signature and oath may be waived by the complainant, and the filing of a reply is evidence of such waiver.

August 6th. An answer was put in for all the defendants in the cause in October, 1827. By the caption it purported to be the joint and several answer of Ebenezer S. Beach and all the other defendants; and was signed by the sole signature of all the defendants; but through inadvertence it was sworn to by Beach. The complainants filed a reply treating it as the answer of all the defendants; and testimony was taken in the cause, and the proofs regularly closed therein. Two motions were afterwards made on behalf of all the defendants; one to re-examine a witness, and the other to permit them to amend their answer to file a supplemental one; which were denied. On both these orders the defendants appealed to the court, and the correction of errors, and the decisions of this court were there affirmed. After the decision of the last appeal, and before the appeal from that decision, the defendant Beach, without any previous order of the court, signed and put in a new answer for himself, putting in a new and separate answer for himself; having then recently discovered that he had sworn to the first answer. And the complainants moved to take this answer off the files of the court as irregularly and improperly filed.

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J. Hoyt, for the complainants.

S. A. Foot, for the defendants.

THE CHANCELLOR. There can be no possible doubt that the filing of this second answer, without the leave of the court, was irregular, and the same was a nullity. The court, for the purpose of preventing irregularities and to preserve its files from being encumbered with improper papers, prohibited answers from being filed without oath, except under an order of the court. But an answer thus filed was good as against the party who put in the same, and it did not lie in his mouth to complain of his own irregularity, or of that of his solicitor. If the complainants had known of the answer not being sworn to, they might notwithstanding have treated it as a valid answer; and if they chose to treat it as such, it would have the same effect in favor of the defendants as if it had been sworn to by all. Whether in this particular case their solicitor did know of the fact is therefore immaterial, though I presume all parties supposed for nearly two years afterwards that it had been actually sworn to by all the defendants whose answer it professed to be. As it was a joint and several answer, if it was irregular as to one of the defendants, it was irregular as to all. There is no pretence that it was not precisely such an answer as Beach would have consented to if it had been presented to him, at that time, instead of being put in by his co-defendant, who was also his solicitor; though subsequent events have made it of importance to all the defendants now to alter their defence. At the time this last answer was put in, the other defendants had the same right to take advantage of their former irregularity as Beach himself. The testimony had been taken for all the defendants, and the cause was in readiness for hearing as to all.

This irregularity has not been cured by any act of the complainants. Even if the subsequent appeal was not an absolute abandonment of his answer, the complainants have done no act founded on the answer by which it was treated as a regular proceeding. It was, in that stage of the proceedings, absolutely void, and could not be made

1830:
Fulton Bank
v.
Beach.

1830.

Law
v.
Ford.

good without some positive act of the complainants affirming its validity. If they had filed a replication thereto, neither party could have taken any proofs thereon without a special order of the court, as the proofs were regularly closed; and the court of errors, on the appeal which was then pending, have decided that they cannot be opened. It was therefore not material whether they moved to take it off the files immediately after it was placed there, or at a later period. If this motion had not been made, the paper thus filed could not, on the hearing, have been treated as any part of the pleadings in the cause; and after the decisions of the court of dernier resort on other questions in this cause, founded on the presumption that the cause was in readiness for hearing on the pleadings and proofs as they formerly stood, this court could not have treated this as a valid answer.

As this paper is improperly on the files, and ought not to remain there to produce confusion in the records, the motion that it be taken off the files must be granted. But as the same thing would have been done at the hearing, on a mere suggestion, when all the facts were before the court, I shall not charge the adverse party with the costs of this application.(a)

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*LAW v. FORD.

As a general rule, each one of the members of a copartnership has an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm.

Where either partner has a right to dissolve the partnership, and the articles of copartnership do not provide for the settlement of the concern, upon a bill filed for that purpose by one of the partners, the appointment of a receiver is a matter of course.

In such case the court will direct the receiver to apply the partnership funds to the payment of all the debts of the firm, rateably, without giving any preference to the favorite creditors of either partner.

(a) Affirmed December, 1830, 6 Wend. Rep. 36.

THIS was an application for the appointment of a receiver, to dispose of the effects and close up the concerns of a partnership, on a bill filed by one partner against another. The application was resisted on the ground that the partner who was in possession of the partnership books and effects, was willing to give security for the faithful application of the effects in payment of the debts.

1830.

Keyes

v.

Brush.

Nov. 10th.

S. B. H. Judah, for the complainant.

Jesse Oakley, for defendant.

THE CHANCELLOR said that, as a general rule, each partner had an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm. That where either party had a right to dissolve the partnership, and the agreement between the parties made no provision for closing up the concern, it was of course to appoint a manager or receiver, on a bill filed for that purpose, if they could not arrange the matter between themselves. That in such a case the court would direct the receiver to apply the partnership property and funds to the payment of all the debts of the firm, rateably, without giving a preference to the favorite creditors of either partner.

*KEYES v. BRUSH.

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Where an absolute assignment of all the assignor's property and choses in action, contained a provision that the assignor would, with all convenient speed, make out an inventory of such property and choses in action, and which inventory, when made out, was to be considered a part of the assignment; it was held that the assignment conveyed a present interest to the assignee, and that its taking effect did not depend upon the making out of the inventory.

If the assignor neglects to furnish the schedule required by the assignment, the assignee may file a bill for discovery against him, and also to obtain

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Keyes

v.

Brush.

a delivery of the books and securities; and he will also be entitled to an injunction against the assignor restraining him from wasting the property.

Where an insolvent debtor assigns all his property to his surety for his indemnity, the surety is entitled to the possession of the property so assigned, in order to discharge the responsibilities which he has assumed for the debtor.

The creditors of the insolvent debtor to whom the surety is liable, can also compel the appropriation of the property in the manner directed by the assignment.

If the assignee becomes insolvent, the assignor may apply for the appointment of a receiver to execute the trusts declared in the assignment.

Nov. 16th

THIS was a motion to dissolve the injunction, heretofore issued in this cause, restraining the defendant from collecting or selling, assigning and transferring certain debchoses in action, goods and other property assigned to complainant to indemnify him as endorser and security for the defendant, and to pay off the debts for which complainant had become responsible.

J. O. Morse and M. T. Reynolds, for the complainant

Alvan Stewart, for the defendant.

THE CHANCELLOR. The defendant is under a mistake supposing that the assignment of the 26th of May, 1836, was inoperative in consequence of his neglect or refusal to make out and annex thereto a schedule or inventory of the property and effects assigned. The assignment was a valid one and conveyed a present interest to the complainant in all the property, choses in action, and effects of the defendant. The part of the agreement relied on by the defendant as conditional, after making an absolute grant and conveyances of all the property, effects and choses in action of the defendant of every description, concludes as follows: "A just and true inventory of all which books, accounts, debts, bonds, notes, demands, goods, chattels and property, is to be made out in writing by the said E. Brush with all convenient speed, and to be annexed hereto, and be made and considered a part of this index."

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ture of assignment." The annexation of the schedule was not a condition precedent, upon the performance of which the assignment was to take effect. The neglect to specify the particular property and effects intended to be conveyed might furnish a presumption of fraud in a suit between the assignee and other creditors of the defendant; and for that reason, as well as for the convenience of all parties, it was proper to insert that clause in the covenant. A similar question recently came before the supreme court of Massachusetts, in *Emerson v. Knowler*, (8 Pick. Rep. 63,) and it was there held that the assignment was valid and binding on the assignee, although the assignor had neglected to make out and annex the schedule according to his agreement. In the case before me the intention of the parties is perfectly manifest; for it was, in and by the assignment, agreed and declared that the assignee should immediately take into his possession the assigned property, and which was to be specified in the inventory that Brush was to make out with all convenient speed.

But it is said this was a hard and unconscientious agreement which this court ought not to aid the complainant in enforcing. If this was only an agreement on the part of the defendant to give a preference, the specific performance of which might deprive the defendant of the benefit of the insolvent acts, this court would certainly hesitate long before it would decree a performance. I am satisfied however that the preference has already been given, and that the legal interest in the tangible property, and the equitable interest in the choses in action, is already in the complainant. The property cannot therefore be reached by other creditors until the debts for which Keyes is responsible are first satisfied. The only question now is whether the insolvent assignor shall be *permitted to appropriate the proceeds of the property to his own use, or shall allow them to be received and applied to the satisfaction of these particular debts. The creditors of Brush,

1830.

Keyes

Brush.

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1880. to whom the complainant is responsible, have now an interest in this question ; and may, if they please, compel an appropriation of the property to the objects of the trust in the manner contemplated by the assignment. If the assignee is irresponsible, even the defendant has such an interest in the property as would authorize him to apply for the appointment of a receiver to collect and apply the proceeds of the assigned property to the purposes of the trust.

Snelling
v.
Watrous.

The remedy of the complainant at law was not complete. As the defendant had neglected to comply with his agreement to furnish an inventory of the assigned property, it was necessary for Keyes to come here for a discovery thereof, and to obtain a delivery of the books and securities. It was also necessary to come to this court for injunction to prevent the property from being wasted by the defendant. The court having obtained jurisdiction of the suit for these legitimate purposes, will now retain it for the purpose of having the property collected and applied to the objects of the trust. The answer, so far as it is responsive to the bill, shows that the injunction does not restrain the defendant from doing any thing which he has a legal or equitable right to do. The injunction must therefore be retained until the further order of the court. Either party is to be at liberty to apply for a receiver, on due notice of such an application, to collect the trust funds, and to preserve them pending this litigation ; and the costs of the present motion are to abide the further order of the court.

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*SNELLING & BAXTER v. WATROUS AND OTHERS.

Where the defendant was in contempt for not putting in an answer, and an attachment had been issued against him, upon which he could not be found ; and afterwards, upon his application to the proper officer for his discharge under the insolvent act, the complainant, with the view

of procuring his arrest upon the attachment, obtained an order for his personal examination before such officer, and after such examination of the defendant was closed, and as he was leaving the office, the complainant caused him to be arrested upon the attachment, *it was held*, that as the defendant was arrested by such an improper contrivance, he ought to be discharged.

1830.

Snelling
v.
Watrous.

An attachment for the non-payment of costs only, although in form a criminal, yet in substance is a civil proceeding, and a party will be entitled to the like protection from arrest thereon, as in other civil process, during his attendance as a party or witness before some court or officer, and a reasonable time to go and return.

Whether the like protection would be extended to cases where the court can punish by fine and imprisonment upon an attachment to enforce a civil right or remedy? *Quæra.*

THE defendant Watrous was in contempt for not answering; and an attachment was issued against him, upon which he could not be found by the officer. But having applied for his discharge under the insolvent act, to the recorder of New York, the complainant's counsel opposed his discharge, and procured an order for his personal examination before the recorder. After the defendant's examination was closed, and as he was leaving the recorder's office, the complainants' counsel caused him to be arrested on the attachment. The defendant immediately applied to the recorder for his discharge, who referred the question to the chancellor for his decision thereon.

Nov. 22d.

D. D. Field, for the complainants.

C. W. Sanford, for the defendant.

THE CHANCELLOR. If this was an attachment for the non-payment of costs merely, or a precept to commit the defendant for the non-payment of a sum of money, under an order of the court, the proceeding, although in form in the name of the people, would in substance be a civil proceeding; *and the defendant would be protected from arrest thereon during his attendance before the recorder,

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1830. and until he had a reasonable time to return home. (Ex parte Parker, 3 Ves. 554. *United States v. Edme*, 9 Serg. & Rawl. 150. Ex parte Eicke, 1 Glyn. & Jan. 261.)
 Hallenbeck v. Bradt. Whether the protection extends to those cases in which the court is authorized to punish the party by fine and imprisonment, on an attachment to enforce a civil right or remedy, admits of some doubt.

But under the circumstances of this particular case, the defendant must be discharged from the arrest. Where the party has not in fact been guilty of a crime, this court will not permit the complainant to resort to any unfair and inequitable method to enforce the process of attachment. It is very evident that the proceeding before the recorder to procure the personal attendance of the insolvent was a mere device to enable the complainants to arrest him on this attachment. I cannot allow a party thus to abuse the process or the remedial power of any court. In *Wells v. Gurney*, (8 Barn. & Cress. 679,) where by the contrivance of the plaintiff's attorney the defendant was arrested on Sunday for an assault actually committed, but for the real purpose of detaining him until Monday, so that he might be arrested in a civil suit, the court of king's bench discharged the defendant from the last arrest.

The defendant Watrous must be discharged from the arrest on this attachment; but on condition that no action for false imprisonment be brought by him.

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*HALLENBECK AND WIFE v. BRADT AND OTHERS.

The share of the proceeds of a sale in partition belonging to a wife will not be paid to the husband, unless a master certifies that on a private examination of the wife, he fully explained to her the nature and extent of her rights, and that she voluntarily consented to relinquish them in favor of her husband, either absolutely or on the terms and conditions specified in such certificate.

Such consent given before a commissioner of deeds is insufficient.

THIS was an application for an order to permit the husbands of two parties in a partition suit to receive the shares of the proceeds of the sale which belonged to their wives. The petition upon which the application was founded, and which contained the consent of the wives to such an order, was acknowledged before a commissioner of deeds.

1890.
Hallenbeck
v.
Bradt.
December 3d

THE CHANCELLOR decided that such an acknowledgment was insufficient. That the acknowledgment and consent of the wife must be taken before one of the masters of this court, who was competent to understand the nature and extent of her equitable right to a provision out of her separate property before it could be claimed by the husband. That it should appear from the certificate of the master that on a private examination of the wife he had fully explained to her the nature and extent of her rights, and that she voluntarily consented to relinquish them in favor of the husband, either absolutely, or on the terms and conditions specified in such certificate.[1]

[1] In equity, there is no necessity that a partition should be so made as to give each party a share in every part of the property. Each party must have their share in value, which is all that is required. *Brookfield v. Williams*, 1 Green's Ch. Rep. 341. To make the value of the several shares equal, one party may be required, under certain circumstances, to pay money on his share to those who receive a share of less value. *Ib.* An equitable partition may be made so as to assign that portion of the land on which the improvements are placed, to the person who has made them. *Ib.* Where one of the tenants in common, of an undivided tract of land, pays the taxes upon his share of the tract, and a certain number of acres undivided are sold out of the whole tract, to pay the taxes upon the shares of his co-tenants, his legal interest in the whole tract will not be diminished by such sale, but the sale will only diminish the interests of his co-tenants in the undivided tract. *Braker v. Devereaux*, 8 Paige, 513. Three persons, who, under the construction of a will, turned out to be tenants in common with others, and who had expended a large sum in valuable improvements on the premises, in good faith, supposing that they were the sole owners, were allowed, in partition, for such amount as the present value of the premises was enhanced by such improvements.

1830. *Conklin v. Conklin*, 3 Sand. Ch. Rep. 64. F. the complainant he has the whole title, improves parts of real estate, and make
 In the matter of Hemiup. and sells a portion. Afterwards it turns out that the legal estate is in R.'s heirs. In a bill for partition: It was held, that the complainant and his grantees should have the improved portion, and that his grantees should be liens thereon. *St. Felix v. Rankin*, 3 Edw. Ch. Rep. 104. In the case of partition of real estate, held in joint tenancy or common, there is an implied warranty between the parties to the partition, by which they have a mutual right, in case of an eviction of the plaintiff's title, to have compensation from each other for the loss sustained, and this right exists against alienees, though not in their favor. The remedy is by bill in chancery, either by setting aside the partition, if being founded in mistake, if it can be done without injustice, then by a decree of pecuniary contribution. *Sawyers v. Catlett*, 10 Tenn. Rep. 256. Lapse of time will not raise the presumption of partition of lands, so as to bar the claims of minors, unless there is evidence that there had been a division. *Holt v. Robertson*, 1 Eq. Rep. 475. Where partition of personalty which allotted to a wife her distributive share was made in 1831, and the return was made pro tunc in 1835, more than four years afterwards, and she died in the mean time, but the husband had possession before the partition, held, that the marital rights of the husband had attached on the partition allotted to his wife. *Huson v. Wallace*, Richardson's Eq. Rep. 104. An order confirming the return of commissioners in partition, looks back to the actual partition, and operates to vest the legal title in the parties from that time. Ib. Where the complainants in a partition suit, gave a mortgage upon their interest in the land of which partition was made during the pendency of the suit, and the premises were afterwards sold under an order of sale made in that suit, it seems that the bond and mortgage cannot apply, by a partition in that suit, if the mortgagee is not a party, for the payment of the part of the proceeds of the sale, which, by the decree, are directed to be paid to the complainant. He must seek his relief by bill. *Ellis and wife v. Messervie and others*, 467. See Waterman's Am. Ch. Dig. tit. PARTITION.

IN THE MATTER OF HEMIUP.

Upon an application under the statute, (2 R. S. 110, § 61,) to rectify irregularities in the sale of real estate made by an administrator under order of a surrogate, it was held that an injunction to stay proceedings at law could not be granted until the report of the master of the facts and the names and residences of the persons entitled to the estate, as heirs or devisees, or as persons claiming under them

Upon the appearance of the parties entitled to the estate, a temporary injunction may be granted, to stay the proceedings at law until the question "as to the fairness of the surrogate's sale is determined by the court; and a reference will be made to a master to examine the witnesses as to this point. 1830. In the matter of Hemiup.

Wherever the court of chancery has power to make an order in consequence of possessing jurisdiction over the subject matter of the suit or proceeding, and which a person is bound to obey in consequence of his being either actually or constructively a party to the suit, it may enforce obedience to such order by the process of injunction founded upon a petition merely, although no bill has been filed against such person.

The filing of the petition in such cases is a substitute for a bill, and is a substantial compliance with the statute, (2 R. S. 179, § 71.)

The provision of the statute prohibiting the issuing of an injunction until the bill is filed, relates only to those cases where the court obtains its jurisdiction of the cause in no other way than by a proceeding by bill.

The court has no power to rectify any other irregularities in a surrogate's sale than those specified in section 61, (2 R. S. 110.)

The remedy of the purchaser in other cases is either at law against the executor or administrator upon the covenants in his deed, or by bill against the heirs, upon the ground that they have been benefited by the proceeds of the sale.

A PETITION was presented in this case, under the provisions of the revised statutes, to rectify certain irregularities in the sale of real estate by an administratrix under a surrogate's order, and to confirm the sale. (2 R. S. 110, § 61.) The petition set forth the sale, and stated that the petitioner had acquired title by divers mesne conveyances from the purchaser; that the heirs at law of the intestate had commenced an action of ejectment to recover the premises from the petitioner; and that he had recently discovered his title under the sale to be defective, because no discreet person had been appointed by the surrogate to join in the sale, as was required by the statute in force at the time the order for such sale was made. (1 R. L. 451, § 24.) The petitioner prayed for the usual order of reference under the statute; and also for an injunction to stay the proceedings at law in the mean time. Dec. 7th.

THE CHANCELLOR decided that in that stage of the pro-

1880. In the matter of Hemmip. proceedings his authority was special, and was limited by the statute to the making of an order of reference to the master to report as to the facts, and the names and residence of the persons entitled to the estate as heirs at law or devisees of the decedent, or as claiming under them. The

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until such *preliminary examination and report had been made by the master, the court could not know who were the persons against whom the proceeding was instituted. That having no jurisdiction, either over the property for the recovery of which the suit was brought, or over the persons of the plaintiffs in that action, an injunction to stay their proceedings at law could not then be granted.

After notice had been published, and had been served on the heirs at law of the intestate residing in this state the latter appeared to show cause why the sale and conveyance should not be confirmed. The chancellor, being prepared to decide the question at that time, the application was renewed, on the part of the petitioner, an injunction or order to restrain the trial of the suit at law until the final decision of this matter.

J. Rhoades, for the petitioner.

C. M. Hopkins, for the heirs at law.

THE CHANCELLOR. The heirs at law who come here to oppose this application are now parties to a suit or proceeding before the court; and as such parties they may be compelled by an order of the court to do, or to refrain from doing any thing which is necessary to enable the chancellor to exercise the jurisdiction and give such relief to the petitioner as was contemplated by the statute. It would be a matter of course, on a bill filed, to enjoin the heirs at law from proceeding in the ejectment suit until the question could be disposed of on this application. The relief asked for here would be in a great measure useless if the heirs were permitted to go on with their suit at law

and obtain possession of the property, and collect their costs and the mesne profits, while these proceedings were delayed by a protracted examination of the merits, or by an appeal to the court for the correction of errors from the decision of the chancellor.

1830.

In the matter
of Hemmip

The provision of the revised statutes, (2 R. S. 179, § 71,) which prohibits the issuing of an injunction until the bill is filed, is to be construed in connection with the section immediately preceding, relative to the subpoena. Those *provisions relate only to cases where the court obtains jurisdiction of the cause by a proceeding by bill; and where, by the English practice, the plaintiff was in some cases permitted to take out and serve a subpoena and injunction before his bill was actually filed. (1 Grant. Ch. Prac. 18.) It is a mere extension of the 22d section of the statute 4 Anne, ch. 16, which contained an exception in favor of injunction bills. There is a variety of cases in which this court enforces its orders and decrees by injunction, where the proceeding is founded on a petition only, and without any bill filed. The filing of the petition in these cases, which is the substitute for a bill, is a substantial compliance with the requirement of the statute. In this case the notice which is required to be served on the heirs at law, or to be published if they are absentees, is a substitute for the subpoena, and gives the court jurisdiction over their persons, so far as is necessary to compel obedience to any order properly made in relation to the subject of this proceeding.

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Wherever this court has power to make an order in consequence of having jurisdiction over the subject matter of the suit or proceeding, and which a person is bound to obey in consequence of his being either actually or constructively a party to the suit, it may enforce obedience to such order by the process of injunction, under the seal of the court; which is the usual way of giving notice of its orders and decrees to those who are not actually or constructively present in court. Thus in the case of

1880. *In the matter of Hemmip.* Creagh, a lunatic, whose property was under the control of the court, in the hands of a committee, an injunction founded on a petition merely, was issued, to restrain tenant of the estate from committing waste thereon. Ball & Beat. 108.) And in *Casamajor v. Strobe*, (1 E & Stu. 381,) where a person, not a party to the suit, become a purchaser under the decree, the court decided that he had thereby submitted himself to its jurisdiction as to all matters relating to him in that character, might by order be compelled to pay the purchase money. He was therefore enjoined from committing waste on property sold until the purchase money was paid. It is also the ordinary practice of the court, where it has made a decree for an account and distribution of the fund in the hands of executors and trustees, to restrain legates and creditors, not parties to the suit, from proceeding in law against the executors or trustees; whether such creditors or legatees have come in and proved their debts under the decree or otherwise. And this is constantly done by petition in the original suit, and without the assistance of a new bill against the parties enjoined. (*Bechamp v. The Marquis of Huntley*, Jacob's Rep. 5. *Farlon v. Wilson*, 11 Price's Rep. 95. Eden on Inj. 2. So also in proceedings before the English chancellor in bankruptcy, which is not strictly a proceeding in the court of chancery, it is his constant practice to exercise his power of making orders affecting the rights of persons who are actually or constructively parties to the proceedings, and to enforce obedience to such orders by process of attachment, under the great seal, or commitment. (Ex parte Hardenburgh, 1 Rose's Rep. 204. Ex parte Pease, 232. Ex parte Figes, 1 Glyn. & Jam. 122. Ex parte Gould, id. 231. Ex parte Hawkins, 1 Mont. & M'A. 115.)

In the case now before me the court has jurisdiction over the parties who have appeared to oppose this application. It will be necessary to direct a reference to

master, so as to give both parties an opportunity to examine witnesses, as to the bona fides of the sale, who may be unwilling to make affidavits of the facts. The ends of justice therefore require a temporary stay of the proceedings at law until this court can dispose of the question now pending before it, and an injunction must issue accordingly, unless the plaintiffs in the suit at law will stipulate on the trial to waive the objection that no discreet person was joined with the administratrix in the sale and conveyance.

1881.

Graham
v.
Stagg.

The other objections to the regularity of the proceedings, such as the neglect of the surrogate to appoint guardians for the infant children, and the question whether he could authorize the administratrix to decide that a part of the lot could not be sold without prejudice to the heirs, or whether he should have examined and adjudicated upon that point himself before the order of sale was made, must be left open for the decision of the court of law. If these are defects which *render the title acquired under the sale invalid at law, they cannot be cured by the chancellor on this petition. And the purchaser must seek his remedy against the administratrix and her husband, on the covenants in the deed; or if he has any equity as against the heirs at law, on the ground that they have been actually benefited by the proceeds of the sale, he must seek his relief by bill against them, in the usual manner.

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GRAHAM v. STAGG.

The court of chancery will not entertain jurisdiction of a cause upon the ground that the complainant, by mistake, interposed a plea in a suit at law, which did not cover his defence to such suit; where, by the ordinary practice of the court in which such suit was pending, he would have been permitted to amend.

Although a jurat to an answer is not in the precise form prescribed by the rules, yet, if the answer is retained by the complainant five months with-

1831.

Graham
v.
Stagg.

out objection, the informality cannot be urged by him as a ground for refusing a motion to dissolve an injunction ; especially where the jury would be deemed sufficient upon an indictment against the defendant for perjury.

January 24th. THIS was an application to dissolve an injunction, on the coming in of the answer. The facts appear in the opinion of the court.

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THE CHANCELLOR. The complainant was sued at law upon the covenants, contained in a lease to him from Stagg, for the recovery of the rent of the demised premises. The only equity charged in the bill is that the complainant assigned the lease to one Houston, and that Stagg took from the latter a surrender of the lease, and thereby discharged the lessee from his covenants. The answer of the defendant denies all knowledge, information or belief that any such assignment was made, or that the defendant ever had any transactions whatever with Houston, or any other person, as to a surrender of the lease. On the contrary he alleges that long after the pretended assignment the complainant continued to pay the rent, and until he became insolvent and left the state. That in consequence of the neglect of the lessee to pay the assessments, according to his covenants, the premises were sold for a term of years, not yet expired, by which the defendant has lost all remedy for the recovery of the rent, except by the suit on the covenants. The affidavit, made at the time a mortgage of the premises was given, is fully explained, even if the defendant was not technically correct in point of law in saying the premises were free of incumbrances, &c. ; for he says the mortgagee, at the time of making the affidavit, was distinctly informed of the existence of this lease. All the equity of the bill is therefore denied by the answer. If all the facts alleged in the bill were true, I am inclined to think the complainant had a perfect defence at law, by the ordinary application to the equitable powers of the court of law to amend his

is court ought not to take cognizance of a cause because a party has by mistake put in a plea as not cover his defence in a court of law; when ordinary practice of that court he would be permitted. The objection that the jurat to the answer in the precise form prescribed by the new rules have been sufficient to have prevented the filing of it, or as the foundation of a motion to set it aside, keeping it in his possession five months without it is too late for the complainant to urge this as a ground for refusing this motion. The answer and attestation in this particular case is sufficient to prove perjury in the defendant, if he ever took a surety, the lease, or discharged the complainant or any person from liability on the covenants. It is in the answer as the jurat to the bill on which the injunction was granted. The injunction must therefore be dissolved.

1831.
Douw
v.
Shelden.

*DOUW v. SHELDEN AND OTHERS.

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to foreclose a mortgage given to secure the payment of \$600, at the rate of two years from the date, with interest semi-annually, upon the time of filing the bill and at the hearing, there was only for one year's interest, cannot be sustained, as the matter in controversy does not exceed the value of \$100. The court could not entertain jurisdiction of the cause under the Statute, though the master should report that the mortgaged premises were situated that they could not be sold in parcels, and that the defendant was in possession and was insolvent. In such a case the court would sustain the bill, if the complainant seeks a proper remedy, as where the whole amount of the money secured by the mortgage was less than \$100, and the defendant was insolvent and insolvent, and the mortgage contained no power of sale, or were subsequent incumbrancers? *Quære.*

In this cause was filed to foreclose a mortgage February 7th 1831, the defendants to the complainant, conditioned

1831. to pay \$600 at the expiration of two years from the date,
 Douw with interest semi-annually. At the time of filing the bill,
 v. and at the hearing, there was only \$42 due for one year's
 Shelden. interest on the bond and mortgage; but the master reported that the mortgaged premises were so situated that they could not be sold in parcels, and that the defendant was in possession and was insolvent. The only question was whether the court was authorized to make any, and if any, what decree, on the bill taken as confessed, under these circumstances.

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THE CHANCELLOR. Previous to the adoption of the present revised statutes it was the settled law of this court that it would not entertain jurisdiction of a cause where the matter in controversy, and for which the suit was brought, was less than £10 sterling. It was so held by Chancellor Sanford in *Mitchell v. Tighe*, (1 Hopk. Rep. 119,) in a case like the present, where one year's interest only was due on a mortgage for \$500; the principal of which had not then become payable. And in *Fullerton v. Jackson*, (5 Johns. Ch. Rep. 276,) on a bill filed for \$28 interest due on a legacy of \$200, payable at a future day, Chancellor Kent dismissed the bill at the hearing; although the executors put in an answer admitting *assets, and offering to pay the interest due as the court should direct. This bill could not therefore have been sustained, even before the revision of the statutes, without showing that the complainant had no other remedy. The present law makes it a duty of the court to dismiss every suit concerning property, where the matter in dispute exclusive of costs does not exceed the value of one hundred dollars. (2 R. S. 173, § 37.) The power of the court to order a sale of the whole premises where a part of the mortgage money only is due, is merely incidental to the right to decree a sale and a satisfaction of what has actually become due. This suit is in fact to obtain payment of the \$42; and if the court has not power to make a decree as

the incidental right to order a sale of the whole as, to prevent a sacrifice of property, cannot confer court the necessary power. Perhaps in a case the complainant had no other remedy; as where it appeared from the bill that the whole amount of the mortgage was less than \$100; that the defendant was insolvent and was insolvent, so that satisfaction could be obtained by a suit at law, and that there was no ground for sale, or that there were subsequent incumbrances that the mortgage could not be foreclosed by advertisement for six months, this court might consider it as an exception in the statute. Even in such a case, it is to take it out of the general provision of the statute should all be stated in the bill. Here there is no ground in the bill that the defendant was insolvent at the time it was filed; and there appears to be no subsequent incumbrances on the premises; and it also appears evidently that there was a power of sale in the mortgage which would have enabled the complainant to foreclose at law. I regret that it is not in the power of the court to give to the complainant a remedy in this suit, under the circumstances detailed in the master's report; and that satisfied it cannot be done without violating the provisions of the statute, as well as overturning the decisions of my predecessors, and the settled law of the court. The bill must therefore be dismissed, but without prejudice to any of the complainant's rights.

1831.
McDougall
v.
Miln.

*McDOUGALL v. MILN.

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The bill, in addition to the discovery sought, contains a prayer for relief, and a replication is filed to the answer, the defendant cannot obtain an order for costs on motion, as upon a mere bill of discovery. On no ground for relief in such a case, the defendant must obtain all orders to produce witnesses and to close the proofs, and then come to a hearing in the usual manner, in order to obtain his

1831. **THE** bill in this cause was filed before the vice chancellor of the first circuit, for a discovery of the consideration of two certain bills of exchange on which the complainant had been sued at law. In addition to the prayer for discovery, the bill contained a prayer for general relief. After the defendant had perfected his answer, a replication thereto was filed by the complainant. The defendant then moved for costs, as on a mere bill of discovery. The vice chancellor denied the motion, and directed that the cost of the application abide the event of the suit. From this decision the defendant appealed to the chancellor.

McDougall
v.
Miln.

March 1st.

C. Edwards, for the appellant.

D. D. Field, for the respondent.

THE CHANCELLOR. The decision of the vice chancellor in this case is beyond all doubt correct. This is not a bill of discovery, but a bill for relief; as it contains a general prayer to that effect. The proper course therefore for the defendant is to obtain orders to produce witnesses and to close the proofs, and to bring the cause to a hearing in the usual manner. If it then turns out that the complainant is not entitled to any decree against the defendant, and that his bill was improperly filed as a bill for relief, he will of course be decreed to pay the whole costs of the litigation. Whether it is possible for the complainant to make out by evidence a case which will entitle him to any relief upon this bill is a question not necessary now to determine. (See 8 Price, 522.)

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*The order of the vice chancellor must be affirmed with costs; and the case must be remitted back to him that such further proceedings may be had in the cause as may be necessary.[1]

[1] See Waterman's Am. Ch. Dig. tit. BILL OF DISCOVERY. The court of chancery compels a discovery in aid of the prosecution of a suit at law upon the same principle and to the same extent, that it compels a discovery

aid of the defence of a suit. *Lane v. Stebbins*, 9 Paige, 622. As a general rule, the complainant who is sued at law, and has a legal defence to the suit, and who only needs the aid of the court of chancery to obtain a bill of discovery to enable him to establish such defence, must come into the court of chancery for his discovery, before the trial at law. *Paterson v. Benge*, 9 Paige, 627. A party to a suit at law cannot be compelled to discover the grounds of his claim in such suit. But the complainant in a bill of discovery must state some fact which is material to the prosecution or defence of the suit at law, which he wishes to establish by the answer to the bill. *Lane v. Stebbins*, 9 Paige, 622. *S. P. Deas v. Harvie*, 2 Barb. Ch. Rep. 448. It is not sufficient in a bill of discovery, for the complainant to state the matters as to which a discovery is sought are material to the defence, in the suit at law; but he must state his case in such a manner in his bill, that the court can see how the matters of which the discovery is asked may be material, upon the trial of the suit at law. If a defendant in a suit at law applies to the attorney of the plaintiff for a discovery, he should at least state to the attorney the material facts which he wishes his client to admit to save the necessity of a bill of discovery. And if the attorney does not possess the information necessary to enable him to make the admission, the defendant should request him to communicate with his client and obtain such admission from him; and then wait a reasonable time to enable the attorney to obtain such admission from his client. *Deas v. Harvie*, 2 Barb. Ch. Rep. 448. A defendant in a suit at law can be compelled, through a discovery bill, to discover, even though the discovery may be fatal to the defence he sets up. *Lane v. Stebbins*, 9 Paige, 622. When a bill in equity seeks for a discovery only, and not for relief also, the defendant will be compelled to answer it, if the court can suppose that it can be in any way material to the plaintiff in support or defence of any suit; although the bill does not state that the right which the plaintiff seeks to enforce cannot be established without the aid of the discovery which is sought. *Peck v. Ashley*, 1 Barb. Ch. Rep. 478. An action on a contract was brought against three defendants, one of whom alone defended it; and the plaintiff filed a bill against him for a discovery of a letter written to him by the other defendants concerning the subject of the action. Held, on demurrer to the bill, that the defendant must answer it, either by making the discovery which was sought by it, or by stating such facts as would excuse him from making the discovery. 1b. It is not necessary that a bill of discovery should state particularly the pleadings in a cause which is pending at law, so as to show what precise issues are made by the parties. It is sufficient, if the bill so describe the case that the court of chancery can see that an appropriate issue may be made. *Hinkle v. Currin*, 1 Hump. Tenn. Rep. 74. A bill of discovery will be sustained to aid the prosecution or defence of a suit in a foreign tribunal. *Mitchell v. Smith*, 1 Paige, 287. Where a bill is filed both for relief and discovery, and the plaintiff is not entitled

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to the relief sought, he cannot have the discovery. *The President, &c. of the Middletown Bank v. Russ*, 3 Conn. Rep. 185. If a bill for discovery also presents matters of account, coming within the jurisdiction of the court, the bill will be retained for the purpose of relief. *Kelsey v. Hobby*, 18 Peters, 269. When a bill is filed to restrain a suit at law, on grounds of defence which could be available at law, if sustained by sufficient evidence, and it is alleged in the bill, that the facts constituting this defence can only be established by evidence from the defendants to the bill; this is a bill of discovery merely, and on the coming in of the answer of the defendant, denying the equity, it is proper for the chancellor to dismiss the bill when he dissolves the injunction. *Steele v. Lowry*, 6 Ala. Rep. 124. Upon a bill for mere discovery, there can be no decree, but the answer may be made a cross bill, upon which relief may be granted. *Dixon's adm'r v. Campbell*, 3 Dana, 607. After a verdict at law, a party comes too late with a bill of discovery. *Duncan v. Lyon*, 3 Johns. Ch. Rep. 355. In a bill for a discovery of usury, and injunction to stay the suit at law, the want of a tender in the bill of the principal and legal interest, is a subject of demurrer. *Tupper v. Powell*, 1 Johns. Ch. Rep. 439. A bill of discovery will lie by a bona fide purchaser, without notice, against a party setting up an adverse title, to ascertain the nature and grounds of that title. *Kimberly v. Sells*, 3 Johns. Ch. Rep. 467. Where there had been a trial at law and verdict for defendant, plaintiff filed a bill of discovery, the charges of which were denied by the answer, and there being no proof against it, the bill was dismissed with costs. *Foltz v. Peart et al.*, 2 Desau. 40. *Askew v. Poyas*, 2 Desau. 145. *Inglis's ex'r v. Nutt*, 2 Desau. 623. *Tylstra et ux. v. Keith*, 2 Desau. 141. *Rutledge v. Greenwood*, 1 Desau. 406. *Dyre v. Sturges*, 2 Desau. 553. There is no doubt that where a bill is merely for discovery, and the defendant makes none, and denies the equity of the bill, the court will dismiss the bill if there be no other sufficient ground to rest the case upon. *Ex'r of Hawkins v. Sumner et al.*, 4 Desau. 105. But the answer having disclosed certain facts, material to the justice of the case, which could not probably have been attained at law, the motion was refused. *Ib.* Where a simple bill of discovery, in aid of a suit at law, shows that the complainant has a good cause of action against the defendant in the action at law, and that the discovery sought for is material to enable the complainant to succeed in such action, it is not necessary, except for the purpose of obtaining an injunction, for the complainant to allege in his bill, that he cannot establish his right at law without a discovery from the defendant. *Vance v. Andrews*, 3 Barb. Ch. Rep. 370. (Vide 9 Paige's Rep. 580; Welf. Eq. Pl. 119; Wigram on Disc. 4, 5.) The filing of a bill of discovery in aid of a suit at law, is justifiable where the costs of such bill will probably be less than the expense of executing a commission in a foreign country, to prove the facts of which a discovery is sought. *Ib.* As a general rule, the defendant in any civil suit may file a bill of discovery, in aid of his defence in such suit, where

the discovery sought is material to his defence. But no person can be compelled to make a discovery in aid of the complainant's defence at law or otherwise, when the effect of such discovery might be to subject him to indictment and punishment, for an offence against the laws of the state. *March v. Davison*, 9 Paige, 580. It is not necessary for the complainant, in a mere bill of discovery, to aver that he cannot otherwise establish his defence at law. And the abstract of the case of *Legget v. Postley*, 2 Paige Rep. 599, to the contrary, is not warranted by the opinion of the court in that respect. *Ib.*

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THE SAME v. A. H. SPALDING.

An affidavit to set aside proceedings for irregularity, should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient, unless an excuse is shown for dispensing with the affidavit of the party or the solicitor.

An affidavit may be sworn to before any proper officer, although he is counsel for one of the parties, or is a partner of the solicitor in the cause.

The rule prohibiting the solicitor or attorney of a party from taking the affidavit is confined to the solicitor or attorney on record.

The provision of the revised statutes prohibiting a master from acting as such in a cause in which he is counsel, does not extend to the mere taking of an affidavit.

The breach of an injunction regularly issued is a contempt of court; and in a proceeding against a party for such contempt, the court will not look into the merits of the cause in which the injunction issued.

The revised statutes have made it the duty of the court, in a proceeding by attachment to enforce the civil remedies or to protect the civil rights of parties, to impose a fine sufficient at least to indemnify the relator for the injury sustained by the contempt, and to satisfy his costs and expenses.

THESE causes came before the chancellor on two several appeals from decisions of the vice chancellor of the 8th circuit. The proceedings in each cause were substantially the same. The first appeal was from an order in each case by which the vice chancellor refused a motion made by the defendants to set aside the attachment issued against

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 v. was from the final order and decision of the court declar-
 Spalding. ing them guilty of a contempt by a breach of the injunc-
 tion; and adjudging them to pay a fine of \$25 each, to-
 gether with the costs of the proceedings against them
 respectively. The questions raised by the appeals are
 stated in the opinion of the chancellor. The appeals were
 submitted on written briefs.

[*327] **M. T. Reynolds* and *A. Sampson*, for appellants.

B. F. Butler and *V. Matthews*, for respondents.

THE CHANCELLOR. The question raised by the first ap-
 peal in each of these causes is whether the attachments
 were regularly issued on affidavits sworn before Hiram
 Gardner, a master in chancery at Lockport. It may be
 proper to remark that the affidavit, on which the motions
 to quash the attachments were founded, was wholly in-
 sufficient. It was not made by the defendants or their so-
 licitor, but by their counsel. He does not pretend to have
 any knowledge of the facts on which the exception was
 founded, except from hearsay; and no excuse is offered
 why the affidavit was made by the counsel instead of his
 clients, from whom the information was probably obtained.
 If the defendants believed the information was true, there
 appears to be no good reason why the affidavit was not
 sworn to by themselves. By the affidavit of one of the
 relators it appears that the information that Gardner was
 counsel for the complainants in the suit was not correct.
 He drew the affidavits and took the oath of the deponents
 to the same at the request of the relators, and in pursu-
 ance of the instructions of the solicitor and counsel in the
 cause, who resided about 60 miles from the place where
 the witnesses were found.

If the suggestion contained in the affidavit had been cor-

that an officer before whom an affidavit was
 sel for the party, is not a valid objection, if
 , solicitor or attorney on record. The rule
 les an affidavit taken before the attorney is
 ical, and has never in this state been extended
 ase of the attorney or solicitor on record. In
 'udd, (15 John. R. 531,) the supreme court
 tend the principle to the counsel in the cause.
 nback v. Whitaker, (17 id. 2,) the same court
 it did not extend to the partner of the attor-
 d, although he was interested in the profits
 is. The supreme court reluctantly consented
 rule in the case of *Taylor v. Hatch*, because
 ie *practice to be thus settled in the court of
 . But the latter court has never extended
 nd the attorney on record; and in *Goodtitle*
 3 Term. Rep. 638,) that court held that it did
 , an affidavit taken before the clerk of the
 ecord. (See also *Cocksedge v. Rickwood*, in
 45, S. P.) In *Read v. Cooper*, the court of
 s in England held that an affidavit taken be-
 ney in fact of the party in the country, but
 the attorney on record, might be used in the
 ose's Rep. 127.) The same distinction was
 ized in that court in *Williams v. Hockin*, (8
 where Gibbs, Ch. J. observes: "We are of
 there is no objection to this affidavit being
 the rule only says, the affidavit shall not be
 the attorney in the cause." The only case
 been able to find carrying the objection any
 tt v. *Vaisey*, on the law side of the court of
 Price's R. 116,) in which an affidavit was
 use it was sworn to before the partner of the
 ecord. But in a more recent case before the
Smith v. Woodroffe, 6 Price, 230,) the Lord
 decided that the rule which precludes the so-
 ord from taking an affidavit in the cause did

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not apply to proceedings on the equity side of that court. A rule of the court has since been adopted, precluding the solicitor of the party, in a suit upon the equity side, from taking an affidavit. (9 Price's Rep. 478.) And in *Cooper v. Archer*, (12 id. 149,) the rule was extended to the actual solicitor for the party, although he was not one of the four attorneys of that court, who alone can appear as such on the record. But in a still more recent case in the exchequer it was held that the rule did not extend to an affidavit of the service of process, or of a declaration of ejectment, which may be sworn to before the attorney or solicitor in the cause. So also in the king's bench, an affidavit to hold to bail may be sworn to before the attorney on record. The only cases in chancery which I have found, are *Ex parte Hogan*, (3 Atk. 813,) where the solicitor to a commission of lunacy was not permitted to take the affidavits on which to found the commission; and *Ex parte Brockhurst*, (1 Rose's Rep. 145,) where the same principle was applied to the case of the solicitor to a commission of bankruptcy. In no case, to my knowledge, has the rule been applied in chancery to any other than the solicitor on record. This also appears to be the rule in all the other courts in England, except in the exchequer where the restriction has recently been carried a little further, in consequence of the peculiar regulations of that court, in limiting the nominal attorneys of the court to four.

As it is a mere technical rule, and as there was no pretence in these cases that any injury had resulted to the defendants by the affidavits being sworn to before the officer by whom they were prepared instead of resorting to another commissioner, the vice chancellor was bound to pursue the settled practice of the court as he found it. He had no power to adopt a different rule of practice, and would have been clearly in the wrong if he had set aside the attachments on this ground.

The provisions of the statute prohibiting matters from

ing as such, in causes in which they are concerned as
citor or counsel, was never intended to apply to the
of the mere taking of an affidavit; and even if they
this case does not come within the prohibition. The
ers refusing the motions to set aside the attachments
it therefore be affirmed, with costs to be paid by the
ellants.

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The next question is upon the appeals from the final or-
s and decrees of the vice chancellor, adjudging the de-
fendants guilty of a breach of the injunction. And here
may be proper to observe, that in deciding that ques-
a he had nothing to do with the merits of the cause in
ich the injunction issued. Neither can the chancellor
e that question into consideration on this appeal.
ile the injunction remained in force, it was the duty
the vice chancellor to punish every breach thereof;
l in no case can a defendant be permitted to disobey
injunction regularly issued, whatever may be the final
ision of the court upon the merits of the cause. If
re is not sufficient equity on the face of the bill to sup-
rt the injunction, the proper course for the defendant
o apply at once for a dissolution, agreeably to the pro-
ions of the 34th rule of the court; and *he may again
ve the court upon the coming in of his answer. In the
ision of this appeal, it is therefore unnecessary for me
express any opinion upon the main question in the
ase, which I have not yet had leisure sufficiently to ex-
ine; although upon the hearing of that appeal, I had
trong impression as to what must be the decision upon
general principles of equity.

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As the question whether there had been a breach of
injunction depended upon matters of fact principally,
s unnecessary to do more on this branch of the case
n to state the conclusion at which I have arrived. By
terms of the injunction, the defendant and his agents
re prohibited from turning away from the race leading
he complainants' mills, the whole or any part of the

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water leased to the complainants by the lessees of the surplus waters, on which the complainants had procured for the use of their mill; and also from using any part of the said water for the purpose of propelling the mills of the defendant. As the owners of the surplus waters only intended to permit so much water to pass from the canal into that channel as the complainants were entitled to under their lease, it is at least doubtful whether the using of any part of that water by the defendants was not a breach of this injunction. But even if they were authorized to take what was not really wanted by the complainants, it is evident from the testimony that the complainants' mills have not at all times had a full supply; by which they have sustained much damage. And this injury is clearly attributable to the diversion of the water by the defendants, in violation of the spirit as well as of the letter of the injunction.

The objection as to the extent of the fines imposed cannot be sustained. The statute has made it the duty of the court, in all cases of proceedings by attachment, to enforce the civil remedies and protect the civil rights of parties; to impose a fine sufficient at least to indemnify the relator, and to satisfy his costs and expenses. (2 R. S. 538, § 21.) Every person who reads the examinations and testimony in this case, must be satisfied that if the vice chancellor erred in relation to the amount of the fine, it was in not making it *sufficiently large to indemnify the complainants, as directed by the statute, for the damages they had sustained by this misconduct of the defendants. It does not lie with the appellants, however, to complain that the fine was much less than the law required the court to impose on them for the indemnity of the relators.

The final orders of the vice chancellor must therefore be affirmed, with costs.

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General order for further time to answer, the defendant cannot put in a demurrer, except on special leave by the court; and if he put in such a demurrer without leave, it will be ordered to be taken off the files for want of clarity.

This rule does not authorize the vice chancellor or master to grant a demurrer-order, giving the defendant further time to demur. To obtain such an order, the application must be made to the court, and the order must be entered with the register or clerk.

There was an appeal from an order of the vice chancellor of the first circuit. On the 19th of May, a notice of the order to answer in forty days, was served on the solicitor for the defendants. On the 29th of June he applied to the vice chancellor, under the 125th rule, and obtained an order giving the defendant 20 days further time to put in an answer, which was subsequently reduced to 15 days. Within that time the defendants, instead of answering the bill, filed a demurrer thereto. On an application to the court, the vice chancellor ordered the demurrer to be taken off the files, with costs to be paid by the defendants. From this decision the defendants appealed to the court.

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Mulock, for the appellants, contended that the order giving the time to answer, gave the defendants the right to demur to the bill during the period of extension, which they had before the original order to answer; that the reason of the rule adopted in England did not apply to the courts here. He cited Cooper's Pl. 14; Barton's Suit in Equity, 105; *Taylor v. Milner*, 22. 444.

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D. Field, for the respondent.

CHANCELLOR. It is a well settled rule of practice

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in the English court of chancery, that a defendant cannot put in a demurrer without a special permission of the court, after he has obtained a general order for further time to answer; and if he does file such demurrer, it will be ordered off the files for irregularity, with costs. (*Dyson v. Benson*, Cooper's Rep. 110. 4 Bridg. Dig. tit. Ans. 3, Demurrer, 7. 1 Wils. Ch. Rep. 468. 3 Swans. Rep. 683.) Where the defendant wishes for further time to demur, he must obtain a special order from the court for the time to answer, plead, or demur. But if through inadvertence he has obtained a general order to answer only, the court may, under peculiar circumstances, and upon due notice to the adverse party, give him special permission to put in a demurrer, notwithstanding the general order for time to answer. Although the mode of compelling an answer is somewhat varied by the practice of this court, it was never intended to change this salutary principle of requiring the party to file his demurrer within the ordinary time for answering, unless the court for special reasons thinks proper to give him further time to demur as well as to answer. Forty days is ample time for a defendant to examine the bill, and decide whether it should be demurred to or answered; but it may frequently require a much longer time to prepare a proper answer. The time for demurring by our practice, being five times as long as it is in England, very few cases can occur where the court would be justified in extending the time to demur; although it is almost a matter of course to grant one order for time to answer, in litigated causes, where the object of the defendant is not mere delay. The order in this case was a mere chamber order, granted out of court under the provisions of the 125th rule, and was not entered in the minutes. It could not therefore have been any thing more than a mere order to answer. Even if the vice chancellor had intended *to give further time to demur, he had not the power to grant such an order, out of court, under that rule. As the suit was

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pending before him, he might, under the 126th rule, have granted further time to demur, on special cause shown. But orders made under the last mentioned rule, and all other orders made by the court, must be entered with the register or clerk, which is the only correct mode of authenticating the proceedings and orders of the court.

The filing of a demurrer, after the defendants had applied for, and obtained this chamber order for further time to answer only, was irregular; and the decision of the vice chancellor was correct, and must be affirmed, with costs. The proceedings on this appeal must be remitted to the vice chancellor, that the costs may be there collected; and that such further steps as are necessary may be taken to compel the defendants to answer the complainant's bill.

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A supplemental bill cannot be filed without a previous order of the court giving permission. But such order may be granted on an ex parte application.

Where an injunction is asked for on a supplemental bill, a copy of the bill is usually served on the party, if he has appeared in the cause, together with a notice of the application. And if the court makes an order for the injunction, leave to file the bill is necessarily implied in such order.

On an ex parte application to file a supplemental bill, the court only examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant.

In a doubtful case the court may direct notice of the application to be given to the defendants who have appeared.

Where an original bill was properly filed by a creditor for to reach the property of the defendant after the return of an execution unsatisfied, held that a supplemental bill was proper to reach subsequently acquired property to satisfy the same debt.

The court will not permit a party to file two original bills, and carry on two suits at the same time against the defendant to satisfy the same debt.

The judgment creditor only acquires a specific lien upon the equitable property which belonged to the defendant at the time of filing his bill,

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or upon the proceeds thereof. If he wishes to obtain a priority as to subsequently acquired property, he must file a supplemental bill.

*The court will not permit supplemental bills to be filed in such a case, merely to harass the defendant, or to deprive him and his family of his daily earnings.

If a supplemental bill is unnecessarily or improperly filed, it may be dismissed at the hearing, although the defendant obtains a decree on the original bill.

Upon a judgment creditor's bill the complainant may reach the defendant's interest in the effects of a copartnership, after payment of the partnership debt and satisfying all prior equities in favor of his copartners.

The policy of the present laws of this state is to relieve the unfortunate debtor from imprisonment; but, at the same time, to compel him to surrender up all his property and effects, or so much thereof as is necessary to satisfy the just claims of his creditors. And the court of chancery will not permit him, by any shift or device, to place his property beyond their reach.

THE complainants, being judgment creditors of the defendant Price, filed their bill before the vice chancellor of the first circuit to obtain satisfaction of their debt out of his equitable property. And the usual injunction was granted thereon. Price demurred to the bill, which demurrer on argument was overruled. From that decision he appealed to the chancellor, which appeal has not yet been disposed of. The complainants afterwards prepared a supplemental bill, setting forth those proceedings, and showing among other things that since the filing of the original bill, Price had become the owner of 250 shares in the stock of the Harlem Canal Company, the par value of which was \$50 a share; and that since the filing of the original bill he had also received upwards of \$2000 in money from another source. Price and the Harlem Company were made defendants in the supplemental bill. This bill prayed for an injunction to restrain Price from selling or assigning the stock, and the company from permitting a transfer thereof; and that the same might be sold, and applied to the satisfaction of the complainants' judgment. An *ex parte* application for the injunction having been made to the vice chancellor, he direct

thereof to be given to the defendant Price, which done accordingly. On the hearing of the parties re court, the motion for the injunction was denied costs. From that decision the complainants appealed to the chancellor.

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Bleeker, for the appellant.

Selden, for Price the respondent.

THE CHANCELLOR. The objection that the supplemental was filed without a previous order does not appear to be a valid answer to the application. There was no necessity of filing it previous to the argument of the motion, as the vice chancellor intended to direct an order to be made to cause why the injunction should not be granted; which does not appear to have been intended. But if the bill was sufficient in the bill to authorize the granting of the injunction, it would then have been filed as a matter of course; as the injunction could not issue until the bill was actually filed. If the injunction was proper, the fact that the complainants had, through inadvertence, filed their bill on file a few days too soon, would afford no ground for refusing the application then made. If the bill showed a case entitling them to an injunction on the supplemental bill, the order for leave to file the bill was matter of course; and, if necessary, the complainants would have been permitted to re-file it, as of that time. No reasons are stated for the refusal of the application; I presume the vice chancellor did not suppose it was necessary for the complainants to get an order for leave, to actually file the supplemental bill, before notice of motion could be given. The usual practice is to serve a copy of the supplemental bill on the defendant who has appeared in the cause, together with a notice that the writ will be applied to, upon such bill, for an order that the injunction issue according to the prayer thereof. If

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the injunction is allowed, the leave to file the bill is always implied in the order, if it is not stated in express terms. Although a party may not file a supplemental bill without permission of the court, leave is usually granted on an *ex parte* application. If there is probable cause for filing it, the leave will be granted of course, and the court only examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. And in a case of doubt, the court may direct notice of the application to be given to the defendants who have appeared.

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The affidavit of the defendant Price that the stock which he had acquired in the canal company was partnership property, *in which another person was interested, and that the stockholders are personally liable for the debts of the company, could furnish no valid objections to the granting of the injunction. If it is unsafe even for this insolvent defendant to continue to hold the stock in his own name, he may apply to the court for leave to have it sold at auction, or otherwise, and to have the proceeds brought into court, or safely invested in some other way to abide the decision in the cause, or until it shall be ascertained to whom the proceeds will eventually belong. The provisions of the revised statutes for the protection of creditors would be rendered perfectly nugatory if an insolvent debtor could place his property beyond their reach, by entering into a copartnership and vesting all his effects in that concern. Where there is a bona fide copartnership, in which the judgment debtor has an interest, the claims of the creditors of the firm to priority of payment out of the partnership effects, and the equitable rights of the several partners, as between themselves, will all be preserved. But if there is a surplus belonging to the debtor, after satisfying all prior equities, his separate creditors are entitled to the aid of this court to reach that surplus; so that it may be appropriated to the payment of their just claims against him as an individual. And he

ill not be permitted, under pretence of preserving the rights of his copartners, or of the creditors of the firm, to sequestrate and appropriate the property to his own use. From another case recently before me, it is known to the court that these same complainants are also proceeding against the alleged partner of this defendant to obtain satisfaction of a separate debt against him. And that he also makes the same objection that he is afraid the creditors of the firm may be injured, or the rights of his copartner violated, if he is restrained from disposing of his interest in his stock. The policy of the law is to relieve the unfortunate debtor from imprisonment; but at the same time to compel him to surrender up his property and effects of every description, or so much thereof as is necessary to satisfy the just claims of his creditors who may be equally unfortunate with himself in having placed their property in his hands. And while I have the honor of a seat here, this court will endeavor to carry the law into effect according to its spirit and intent. The court will, as far as possible, prevent the expense of useless litigation, and protect the really unfortunate against the oppression of their creditors under the forms of law; but will never permit the fraudulent debtor, by any shift or device, to place a part of his property beyond the reach of his creditors. When the man who has lived in ease or affluence becomes insolvent, either by the vicissitudes of fortune, or by his own improvidence, he must learn to recollect and feel that the property in his possession belongs to his creditors in equity, and not to himself or to his family; and that it is his duty as an honest man to see that it is reserved and faithfully applied to the payment of his debts. If he suffers it to be wasted in useless litigation it is generally his own fault; for he has a perfect right, before any one has acquired a priority of lien, to assign and deliver over the whole at once, either to the creditors themselves, if they will accept it, or to some faithful and responsible trustee for the payment of all his debts, rate-

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ably. He may even give a preference to favorite creditors if he chooses to waive the benefit of a discharge under the insolvent acts.

As it appears from the supplemental bill that the stock in question was acquired since the commencement of the suit, if the demurrer to the original bill was properly overruled by the vice chancellor, it seems to follow that this bill is necessary and proper; and that the injunction should have been granted as prayed for therein. If the original bill is defective in substance, so that no decree thereon could have been made at the hearing, the supplemental bill must necessarily fall with it, as the latter is but a continuation of the same suit. But if the complainants were right in filing the original bill, a supplemental bill seems to be the proper mode of reaching subsequently acquired property of the defendant; although in relation to its immediate object, and against the Harlem Canal Company, it may in some respects be in the nature of an original bill, notwithstanding it is supplemental as to the former proceedings.

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This species of bill is recognized by Lord Redesdale as a proper mode of bringing newly acquired interests of the parties, *but relating to the same subject, before the court. (Mitf. Plead. Amer. ed. 49, 50; 4 Lond. ed. 63.) If the defendant at the commencement of the suit has property, of the value of one hundred dollars and upwards, which the complainant has a right to have applied in satisfaction of his judgment, by the aid of this court, he has right to file his bill for that purpose. He thereby acquires a specific lien on that property, which entitles him to a priority of payment out of that fund; subject however to all prior equities which existed against the same at the time of the commencement of his suit in this court. Although as against the defendant himself he might also obtain a decree, which would give him the benefit of all other property which belonged to the defendant at the time the decree was obtained, yet the original injunction does not

the defendant from using or disposing of property
has been subsequently acquired, if it is not the
or produce of that which belonged to the defend-
at the time the injunction was obtained. If another
led by the second judgment creditor, the latter
tain a priority as to the newly acquired property.
bona fide purchaser, or another creditor, to whom
has been assigned in payment of a debt, would be per-
mitted to hold it against the creditor who had filed his
bill at the acquisition of that property. It therefore
was necessary for the complainants in this case, either
to file a supplemental bill to reach this stock and protect
the injunction, or to commence a new suit for that pur-
pose. The expense of a supplemental bill is but trifling,
compared with that of an original suit. And this
certainly would not, except in a case of absolute
necessity and to prevent a failure of justice, allow two
suits to be commenced, and carried on at the
same time, between the same parties, to obtain satisfaction
of the same debt. I think therefore this was a proper
supplemental bill, and that the injunction should
be granted as prayed for therein.

The costs of the complainants, both on original and
supplemental bills, are entirely in the discretion of the
court. The defendant would not be permitted to abuse the privilege
of bringing an unfortunate debtor with supplemental
bills, having no other object than to deprive the family
defendant of the fruits of his daily earnings, or to
increase the costs. And if a supplemental bill is unnecessa-
rily properly filed, it may be dismissed at the hear-
ing, though the complainant obtains a decree on the
bill.

The decision of the vice chancellor must be reversed,
the injunction must issue, according to the prayer of
the supplemental bill; and Price, the respondent, must
pay the appellants their costs on this appeal, to be taxed.
The costs must be remitted to the vice chancellor

1981.

Eager
v.
Price.

[*339]

1881. that the injunction may be issued accordingly; and that
 Requa such further proceedings may be had before him as may
 v. be necessary to carry into effect this decision.
 Rea.

REQUA v. REA AND WIFE.

Where the master, who was directed to sell mortgaged premises under a decree, had written instructions from the complainant's solicitor not to sell the premises for a less sum than \$2600, the amount of the debt and costs, but through ignorance of his duty the premises were sold for \$1000 less to purchasers who were informed of the instructions, at the time of the sale, and before they paid their bid, the court ordered a re-sale of the property.

Where the purchasers took possession of the property and made improvements thereon, after being informed by the master that the tax would be submitted to the court, and without waiting for the confirmation of the report of sale, *it was held*, that they were not entitled to indemnity therefor.

Where a person becomes a purchaser under a decree of the court of chancery, he submits himself to the jurisdiction of the court in that suit as to all matters connected with such sale, or relating to him in the character of purchaser.

March 1st. This was an application on the part of the complainant to set aside a master's sale of the mortgaged premises, on a decree of foreclosure. The premises are situate in the county of Cattaraugus, and the amount due on the mortgage was about \$2300, exclusive of costs. The complainant and his solicitor residing at Albany, the decree was sent to the nearest master, who resided in an adjoining county, with particular instructions to him not to let the premises be struck off to any one, other than the complainant, for a less sum than \$2600. The master supposing it necessary that some third person should make bids in the name of the complainant, endeavored to procure some one residing at Olean, where the sale took place, to bid off the property for him. For some reason not explained, no one would consent to bid as agent of the complainant.

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At length the master employed a transient person by the name of Davis, who agreed to bid up the property to the sum required ; but having made one bid of \$1500, he refused to bid any thing more, although urged by the master to comply with his agreement. The master thereupon supposing it his duty to do so, struck off the property to Martin, Bryan and Chamberlain, for the sum of \$1502, and gave them a deed therefor. Shortly afterwards the master died ; and the report of the sale has never been confirmed.

1831.

Requa
v.
Rea:

J. L'Amoureux, for the complainant.

A. Taber, for the purchasers.

THE CHANCELLOR. It is perfectly evident in this case that the property has been sold much below its value, in consequence of the master's violating his instructions through ignorance or a misapprehension of his duties. Although the purchasers deny that they hired Davis not to bid, it is impossible to resist the conclusion that by the device or trick of some one the property was sold much below its value. If the sale is permitted to stand, the complainant will be defrauded of more than \$1000 ; as he was willing to give for the property the full amount of the debt and costs, and the mortgagor is insolvent. It is not necessary to express any opinion upon the question whether the purchasers were the originators of the trick, or actually used their influence with others to prevent the property from being bid up to its true value. The master had no right to permit the property to be struck off to a third person below the sum limited in his instructions. He should either have adjourned the sale and given notice thereof to the complainant's solicitor, or have put up the property in the name of the complainant at the \$2600, and, if no person bid more, should have struck it off *to him at that sum. If he had adopted the latter course the

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1831.

Requa
v.
Rea.

complainant would have been compelled to take the property at that price. Under the circumstances disclosed the purchasers have no equitable claim to retain the property, as they had full notice before they paid the money and took the deed. The master swears that believing Davis had been induced to betray his trust, he consented to receive their money and give the deed under an express notice to them that all the facts and circumstances would be reported by him to the chancellor for his decision thereon. If they chose to advance the money and take possession of the property after that notice of the equitable claim of the complainant to have the sale vacated, and without waiting for an order of confirmation, it was because they were willing to make an unconscientious speculation, founded upon the trick of Davis and the master's ignorance of his duty, and they must abide the consequences. Where a person becomes a purchaser under a decree, he submits himself to the jurisdiction of the court in that suit, as to all matters connected with such sale, or relating to him in the character of purchaser. (*Cassamajor v. Strode*, 1 Sim. & Stu. Rep. 381.) Unless therefore these purchasers are willing to keep the property and pay the complainant the balance of his debts and costs, over the \$1502, the property must be resold and put up at the sum of \$2600, as on his bid. In that case the money paid by the purchasers must be refunded, the sale to them must be set aside, and the deed cancelled; and they must deliver up the peaceable possession of the premises to the purchaser on the resale. On the coming in and confirmation of the report of the resale, if the purchasers wish such an investigation, the court will order a reference to ascertain whether the rents and profits of the premises have been equal to the interest on the purchase money paid over to the master; and to inquire into all the facts and circumstances attending the first sale, for the purpose of ascertaining whether the purchasers have any equitable claim to an allowance out of the purchase money for these

damages or costs. But they cannot be allowed for any improvements which they have made on the premises, as they went into *possession without authority, before the sale was confirmed, and after notice from the master that there was at least a reasonable probability that the sale would be set aside.

1881.

Osborn

v.

Heyer.

OSBORN AND ANOTHER v. HEYER & BURDETT.

Where two creditors had filed separate bills against the debtor to reach his property, and in one suit a receiver had been appointed, and in the other an injunction granted, restraining the debtor from parting with his books and papers, and from collecting his debts, &c., upon an application to the court, he was directed to deliver over to the receiver, appointed in the first suit, all the property and effects in his hands, together with his books and papers, to be collected and converted into money for the benefit of such of the parties as it should subsequently appear were entitled to the same.

Where the defendant is restrained by injunction from collecting his debts, and preserving or disposing of perishable property, it is the duty of the complainant to apply for the appointment of a receiver; and if he neglects to do so, the court will dissolve the injunction so far as to permit the defendant to collect the debts and dispose of the property himself.

This was an application for an attachment against the defendants for not delivering over to the receiver, appointed in this cause, certain books and papers pursuant to the order of this court. The defendants showed for cause that they were willing to comply with the order of the court, but that they were restrained from parting with the books and papers by an injunction issued on another bill filed against them by Henry R. Heyer and others, before the vice chancellor of the first circuit. The chancellor directed the motion to stand over, and that notice of the application be given to the complainants in the last mentioned suit. Such notice having been given, an affidavit was read on the part of those complainants, in which they

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1831. claimed an equitable right to the whole partnership funds
to which these books and papers related.

Osborn
v.
Heyer.

D. Selden, for the complainants.

J. Rhoades, for the defendants.

J. Edwards, for H. R. Heyers and others.

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*THE CHANCELLOR. It does not appear by the paper before me on this motion, which of these suits was first commenced ; neither do I consider that question material in this case. Here are two suits commenced by different complainants in this court, one before the chancellor and the other before a vice chancellor, against the same defendants, who are admitted to be insolvent, to reach property in their hands which can only be recovered by the aid of this court. One of these parties has obtained an order for a receiver to collect and preserve the property pending the litigation. The other party has obtained an injunction prohibiting the defendants from collecting the debts and preserving the property from waste. In all these cases of bills to reach the equitable property of debtors, on an execution at law returned unsatisfied, it is the duty of the complainant, within a reasonable time after he has obtained an injunction restraining the defendants from collecting their debts, or disposing of their perishable property, to apply to the court and obtain the appointment of a receiver, or to make some other provision for the collection of the debts and the preservation of the property, or the injunction should be dissolved so far as to enable the defendants to preserve it themselves. If the complainants in the other suit, who now resist this motion, had applied for and obtained the appointment of a receiver to take charge of this part of the fund, which they now claim, before the receiver in this cause was appointed, they would have had some grounds for resisting this application ; especially if they had given notice of that appli-

cation to these complainants. In that case the receiver appointed by the vice chancellor would have been the proper person to preserve the fund pending the litigation, and until it was determined to which of the parties it belonged. The receiver appointed in either cause is the officer of the court and holds the fund subject to the equitable rights of all parties; to be disposed of under the order of the court only. As no objection is made to the receiver already appointed, or to the sufficiency of his sureties, the whole of the property and effects in the hands of the defendants must be delivered over to him, together with the books and papers; to be collected and converted *into money, for the benefit of the parties to whom it may hereafter appear to belong. The complainants in each suit are to have notice of all proceedings before the master relative to the delivery of the books, papers and property to the receiver; and with liberty at all reasonable times to inspect and take copies of such books and papers, if they shall deem it necessary for the protection of their respective rights. The receiver must keep a separate account of all that part of the property and effects of the defendants which it is alleged belonged to the firms or partnerships in which the complainants in the suit before the vice chancellor claim an equitable interest, and of all disbursements and expenses relating thereto. And the complainants in either suit are to be at liberty to apply to the chancellor for such special directions to the receiver, in relation to the execution of his trust, as they may be advised are necessary or proper; and each party is to have notice of any application which may be made to this court in the premises.(a)

The defendants must therefore forthwith deliver over the residue of their books and papers to the receiver, or an attachment will be issued against them on the produc-

1831.

Osborn

v.

Heyer

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(a) See 193d and 194th rules, adopted 5th April, 1831, which provide for cases of this description.

1831. tion of the master's certificate of their neglect to comply
 Dows with the order of the court.
 v.
 McMichael.

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*DOWS AND OTHERS v. McMICHAEL.

Where the complainant replies to a plea, he admits its sufficiency; and if the truth of the plea is established the bill will be dismissed.

If at the hearing the plea is not found to be true, it will be overruled as false; and the complainant will be entitled to a decree as on a bill taken as confessed.

If a plea is overruled as false, the complainant will not lose the benefit of an answer if a discovery is necessary; but he may have an order to examine the defendant on interrogatories, before a master, as to the discovery sought by the bill.

March 1st. THE complainants filed their bill in this cause as judgment creditors of the defendant to obtain satisfaction out of his property which could not be reached by execution at law. The defendant pleaded an affirmative plea in bar of the discovery and relief prayed for in the bill; upon which the complainants took issue. Orders to produce witnesses and to close the proofs were regularly entered, but the defendant produced no evidence to establish the truth of his plea. On the hearing of the cause the defendant made default. The complainants claimed the benefit of a discovery of the property and choses in action of the defendant. The only question was as to what decree they were entitled to on this state of facts.

S. Dutcher and J. Harris, for the complainants.

THE CHANCELLOR. Where a plea in bar to the whole bill is put in, if the complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If at the hearing the plea is found to be true the bill must be dismissed. But if the plea is untrue the complainant will be entitled to a decree against the defendant in the same manner as if the several matters charged in the bill had been confessed or admit-

ted. If a discovery is necessary, to enable the complainant to obtain the relief sought for by his bill, the defendant cannot evade answering *by putting in a plea which turns out to be false. In such a case, after the plea is overruled as false, the complainant may have an order that the defendant be examined on interrogatories before a master as to the several matters in relation to which a discovery was sought by the bill. (*Brownsword v. Edwards*, 2 Ves. sen. 247. *Hawkins v. Trollop*, Nelson's Rep. 119.)

1831.
Dows
v.
McMichael

In this case the truth of the several matters charged in the bill being admitted by the state of the pleadings, there is sufficient to authorize the court to decree payment and satisfaction of the complainant's debt out of the property, effects and choses in action of the defendant; and all the necessary discovery can be obtained upon the proceedings under that decree. There must be the usual decree overruling the plea as false, declaring the right of the complainants to satisfaction out of such property and effects; referring it to a master to appoint a receiver and take from him the requisite security; directing the defendant to deliver over and assign to such receiver, on oath, before such master, all his property, effects and choses in action, except such wearing apparel, &c. as is exempt from sale on execution. And the complainants are to be at liberty to examine him, on interrogatories before the master, as to the property, effects and choses in action which he now has, or which he has assigned or transferred to any other person in trust for his family or otherwise, as the said master may deem necessary or proper; with the usual power to the receiver to collect and compromise debts due to the defendant, and convert the effects into money, and pay the amount due to the complainants, for their debt and costs. And either party or the receiver is to be at liberty to apply to the court for such further or other directions in the premises as may be necessary.

1831.

Doe
v.
Green.

*DOE v. GREEN AND OTHERS.

If the name of a counsellor, other than the solicitor in the cause, is signed to the pleadings, the charge for perusing and amending the same should be allowed on taxation, unless the party objecting shows affirmatively that the name of the counsel was improperly placed there.

It is the duty of counsel to peruse and examine the pleadings before they sign them; and they are personally liable, if such pleadings contain scandalous or impertinent matter.

The solicitor is guilty of a misdemeanor, if he puts the name of a counsellor to a pleading without his knowledge and consent.

A second fee is allowed to counsel for perusing and amending a supplemental bill, or bill of revivor, when such bill becomes necessary; not for perusing and signing an amended bill.

Where an amended bill was filed by the agreement of the parties, embracing all the facts in the case, and as a substitute for the previous bill answers to save expense, the complainant, on taxation, was allowed for counsel perusing and amending the same, and for the usual engrossment and copies.

On an ex parte hearing, upon a bill taken as confessed, the solicitor is not entitled to an attendance fee. But where there is an actual attendance and argument with the counsel of the adverse party, to settle important questions arising on the bill, an attendance fee for the solicitor and a full counsel fee are taxable.

The statement of the nature and object of the suit, to be filed in the county clerk's office, is not a notice within the meaning of the fee bill; and is to be taxed by the folio for the draft and engrossment.

Notices served on the defendants in mortgage cases, under the 133d rule, are specifically provided for in the fee bill; and only 37½ cents can be taxed for each notice, including copy and service.

Where the injunction is allowed by the chancellor, it is an act of the court, and the charge for filing the certificate of the allowance is not taxable.

Notice to the register to set down the cause is not a proper charge under the present practice. The notice of the issue is the only one now taxable.

No charge for notices, which are not required by the rules or practice of the court, can be allowed on taxation.

Notice to the register to enter a decree or order is not a proper charge, as the solicitor is allowed for attending in person.

A charge for an engrossment, or copies of an order or decree to be entered, is improper, as it is to be entered from the draft after it is settled by the court or register.

The complainant cannot charge for a copy of a decree for the adverse party, unless in cases where the service of such decree on him is necessary.

1831.

Service of a summons upon the defendant to attend the master on the reference is all that is requisite, and an additional notice for that purpose cannot be allowed.

Doe
v.
Green.

*No allowance can be made on taxation, as between party and party, for the personal expenses of the parties or their witnesses, or of the officers of the court, as disbursements in a cause.

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Where a specific allowance is provided in the fee bill for the performance of any service by an officer of the court no additional charge, by way of disbursement in the performance of such service, can be taxed in favor of such officer or any other person.

If a party insists upon items in his bill which are not legally taxable, he will be charged with the expense of an appeal from the taxation, as to such items. But if the adverse party appeals to the court against the taxation of other items also, which were properly allowed, each party may be left to bear his own costs, on the application for a re-taxation.

This was an application, on the part of the solicitor of the defendant Green, for a re-taxation of the costs of the complainant. On the taxation before the master, various objections were made to particular items in the bill, on the ground that the services charged were useless or unnecessary. As to many other items, it was objected that the services had never in fact been performed; and evidence of the actual performance of such services was required. The complainant's solicitor put in his own affidavit before the taxing officer, stating his belief that the folios were correctly charged, and that the disbursements charged in the bill had actually been made; but the affidavit omitted to state that the services charged had been actually performed.

March 1st.

E. H. Kimball, for the complainant.

J. Ellsworth, for the defendants.

THE CHANCELLOR. As almost every item in this bill of costs was objected to, either on the ground that the service had not been performed or was unnecessary, or that the

1831. folios were overcharged, it may be necessary to examine the items objected to in detail.

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v.
Green.

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The first objection relates to the charge for a retaining fee for counsel, and for counsel perusing and signing the bill, decree, &c. It appeared by the affidavit of Doe, which was produced before the taxing officer, that counsel, other than the solicitor in the cause, was actually employed. And the name of such counsel was subscribed to the bill, and to such of the subsequent proceedings as by the practice of the court *required the signature of counsel. It would be a misdemeanor for any solicitor to put the name of a counsellor to a bill or other pleading without his knowledge and consent. And in *Whitlock v. Marriot*, (2 Rep. in Ch. 386,) the solicitor for a defendant was ordered to pay £20 costs, for putting the name of counsel to an answer without his consent; and to be committed to the Fleet until the same was paid. The fact, therefore, that the pleading is signed with the name of such counsel, is at least prima facie evidence of itself that he has perused and signed the same. If the bill or other pleading contains scandalous or impertinent matter, the counsel whose name is affixed thereto, subjects himself to the payment of costs to the adverse party, as well as to the censure of the court. (*Emerson v. Dallison*, 1 Rep. in Ch. 194.) He may even be stricken off the rolls if such offences are repeated and continued. It is not therefore to be presumed that he has affixed his name to the pleading, or suffered it be done by another, without perusing such pleading, and knowing what is contained therein. To justify the taxing officer in rejecting a charge for counsel perusing and signing the pleading where the name of counsel is subscribed thereto, the party making the objection is bound to show affirmatively that the name of the counsel has been improperly placed there, and without authority.

In ordinary cases, the bill and the amendments thereto form but one record, and counsel are not entitled to a

and fee for perusing an amendment. But where a supplemental bill or a bill of revivor is filed, the counsel is entitled to charge for perusing and signing the same; he is taxed against his own client, or as costs in the case, according to circumstances, and as such service will appear to have been rendered necessary by the act of neglect of the client, or otherwise. But in this case the amended bill appears to have been filed in consequence of an agreement between the parties, and as a substitute for the former bill and answers, to save expense. Under the particular circumstances disclosed, the charge for perusing and signing this second bill was properly taxed by the taxing officer. For the same reason, the charges for a new engrossment of the whole bill, including amendments, and full copies of the same *for the sutors of the respective defendants, were properly taxed.

The amended bill being substituted for the original billings, and taken pro confesso by consent of the parties, as to all subsequent proceedings, it is to be treated as the original bill taken as confessed, and as if no answers had been put in to the first bill. Such was in fact the decision of the court on the hearing of the cause. As any costs which have accrued since the filing of this amended bill, they must be taxed at the usual rates of advance upon the bill taken as confessed. But as there are important questions in controversy arising upon the bill itself, which was in the nature of a statement of the facts agreed upon by the parties, I think the complainant should be allowed for the copy of the bill which was actually made and furnished to the chancellor on the hearing, to enable him to settle the several questions of law and equity arising thereon.

In a decree of course upon an ex parte hearing, where a bill has been taken as confessed, the solicitor is not entitled to the fee of \$5, for attending the court of chancery upon the hearing, although he actually attends with

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the counsel employed to argue the cause *ex parte*. The remarks of Chancellor Kent upon this item in the fee bill of 1818, show that the allowance was intended to be confined to cases where the solicitor not only actually attended, but where there was an actual argument of the cause with the counsel for the adverse party; or, at the least, where the solicitor and counsel for the complainant appeared at the hearing, under a belief that there was to be an actual argument of the case with the adverse party. But even under this construction of the fee bill, the complainant is entitled to the solicitor's fee, and to the counsel fee on the hearing. The cause was actually argued on the merits by counsel for all the defendants who appeared in the cause; and important questions were litigated and submitted to the decision of the court; although the amended bill, which stated all the facts truly, was taken as confessed, to save expense. It was therefore such an argument as is provided for in the last clause of the 14th section of the present fee bill, (2 R. S. 630,) and not a mere evasion to take it out of the operation of the preceding clause of that section.

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The charge for subpœna and copies was improperly allowed at three folios. The subpœna can never exceed two folios, unless there are at least thirty parties in the cause. The taxing officer must have allowed the three folios in this case through mere inadvertence. Some precepts were also allowed, in the same manner, on proceedings since the revised statutes went into operation.

The bill had a double aspect; either to foreclose the mortgage against the lot which Beekman alleged was intended to be conveyed, or to obtain the benefit of the covenants of warranty in relation to that which had been recovered from Green by the ejectment suit. The complainant had probable cause for making the judgment creditors of Green defendants. He is therefore entitled to charge for the statement of the *lis pendens* to be filed in the clerk's office, and for a notice to each of the de-

nts, against whom he made no personal claim, agree-
o the 133d rule. But he is not to be allowed for
a notice to be served either on Beekman or the
agor against whom he claimed a personal decree in
ase. The statement which is filed in the clerk's
is to be drawn and engrossed, and does not come
the specific provision in the fee bill, allowing 37½
for a notice, including copy and service. The no-
o be served on the defendants in the cause is a
ce actually served," and therefore is within that
ic provision. Although the solicitor will be very
quately compensated for drawing and serving the
s in this particular case, it will be made up to him
drawing and serving of many other notices in the
, where the allowance will be found an ample com-
tion for the service rendered. And as these notices
rved with the subpoena, the actual expense of serv-
em will usually be no greater than the service of
bpœna alone. There does not appear to have been
vidence before the taxing officer that these notices
in fact given; and the affidavits of the service of
ubpœnas do not appear on the files of the court,
gh the taxing officer has allowed for filing them.
e injunction was allowed by the late chancellor in
; which was sufficient evidence to the taxing
that it was necessary and proper, especially as it
ever dissolved. The charges connected therewith
therefore all properly taxed, except the one for
g the certificate of allowance." This is only proper
the order is obtained on the certificate of a vice-
llor, or of an injunction master, under the 30th
Every special order for an injunction, made by the
ellor, is presumed to be done in open court when
gister is present to enter the order as directed.
nly legal evidence of the official acts of the chan-
is the order or decree entered in the minutes of the
; although he frequently endorses his allocatur upon

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an order, to save the officer of the court the trouble of appearing in person before him to take down his instructions for the entry thereof.

The master has improperly allowed for a notice to set down the cause, and also for a notice of the issue. This is a double charge, and both cannot be allowed. The notice to place the cause on the calendar states the time of joining the issue and the class to which the cause belongs. The notice of the issue and service, and entering the cause on the calendar, are the only proper charges since the order for setting down the cause has been abolished. The taxing officers should only tax such notices as are necessary in the progress of a cause, and which are required to be given by the rules and practice of the court; and should disallow the charge for all such as are given unnecessarily and for no other purpose than to swell a bill of costs.

The charge for engrossing or copy of an order or decree to be entered in the minutes of the court, is not taxable. When the draft of the decree or order has been allowed and settled by the court, or register, it is to be entered in the minutes from such draft; which is not filed as a record, but merely as a memorandum of the decree which is to be entered. The engrossment is useless, and is never in fact made. The notice to the register to enter the decree must also be disallowed, as the solicitor allowed for attending the register with the draft to have the same settled and entered.

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*The copies of the decree for the solicitors of the adverse parties, and service with notice, do not appear to be proper charges, and should not have been allowed without some evidence of the necessity of such a proceeding. The service of the summons to appear before the master was all the notice of the decree which was requisite; and if either of the defendants desired a copy of the decree, it was his duty to procure it for himself. It is not a proper charge against the fund, in which the

rights were not the same. The notices to the defendants appear on the reference cannot be allowed, as it produces a double charge. No other notice than the service of the summons was necessary.

1831.

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Green

The charge as originally made for the master's attending and settling his report after argument, was the proper allowance, if neither of the defendants' counsel appeared to litigate it at that time; but if both parties appeared to litigate the correctness of his report, he is entitled to two dollars instead of one which was first charged. The notice to the register to enrol the decree, is twice charged; and the draft of the bill of costs and copy for the solicitor's own use must also be disallowed. The register's fees for receiving and paying out the money could not have been included in the complainant's bill, that is always deducted by him from the fund. As the fee for paying out the money was not, in fact, deducted in this case, that item may be retained. The charges for making decree, copies for clerks and postage, certificate of enrolment, and fi. fa. for the residue, must all be disallowed, as the services have not been performed. They would not be necessary, as the fund in court exceeded the amount of the complainant's demand.

The charge for expenses in going to Albany to procure exemplification of the judgment in the supreme court must also be disallowed. The clerk's fees and postage are that which was properly taxable as a necessary disbursement in the cause. Charges for stage fare and other personal expenses of parties, witnesses or officers of the court, cannot be taxed as disbursements between party and party, though they may sometimes be allowed, under peculiar circumstances, as between solicitor and client. No allowance by way of disbursement can be made for the performance of any service, for which a provision is made, in the fee bill, of any officer of the court. Where the service may be performed either by an officer of the court or by another person, the latter is to be allowed for

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1881. the service at the same rate which is allowed by the fee
bill to the officer of the court.

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Green.

The complainant's costs must be retaxed on these principles; and the taxing master must not allow for the drawing or entering any order, or filing any paper, if the same has not been actually entered or filed, nor for any other service which has not actually been performed. The statute is explicit on this subject, and as the defendant's counsel made the objection distinctly to most of the items in this bill, the provisions of the statute must be literally complied with. As the parties have been nearly equally successful in the allowance and disallowance of items which were deemed objectionable by the defendant, on this appeal from the decisions of the taxing officer, neither party is to be allowed any costs as against the other on this application, or on the retaxation. If a party insists upon having items included in his bill which are not legally taxable, he will be charged with the expense of an application to the court for a retaxation. But if the adverse party wishes to obtain costs upon such application, he must not object to items against which no reasonable grounds can be urged. If the court is unnecessarily compelled to examine all the items of a long bill of costs, and decide upon the correctness of the allowance of each, the appellant who only succeeds as to part of his objections will not be allowed the costs of his appeal, and order for retaxation.

The residue of the fund in court in this case, together with the amount deducted from the complainant's costs on retaxation, must be paid over to the solicitor of the defendant Green, to be disposed of as his assignees shall direct.

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*BLOOMFIELD v. SNOWDEN AND OTHERS.

Where the bill was dismissed by a vice chancellor, and an appeal was entered from that decree, but the subject matter of the suit was sold intermediate the entering of the decree and the appeal, the chancellor refused to grant an injunction against the purchaser, who was not a party to the suit, on petition; but permission was given to file a supplemental bill before the chancellor, and to move for an injunction thereon against the purchaser.

It is not the practice to allow an injunction, affecting the rights of a party who has appeared, on an ex parte application to the court upon a supplemental bill; but regular notice of the application should be given to such party.

If a temporary injunction is necessary to prevent irreparable injury before regular notice of the application can be given for a general injunction, the court will grant an order to show cause, and allow such temporary injunction in the mean time; but the temporary injunction falls of course, if the order to show cause is not made absolute.

THIS cause was referred to the vice chancellor of the March 1st
second circuit to hear and decide the same. He made a decree therein dismissing the complainant's bill with costs. From that decree the complainant appealed to the chancellor. Pending this suit, and before the decree of the vice chancellor was made, McDermut and D. & J. Ames acquired an interest in the subject matter of the litigation, by virtue of an agreement with the defendants, and became the equitable assignees of their interest in certain notes, the collection of which was restrained by the injunction. After the decree of the vice chancellor and before the entry of the appeal, McDermut and D. & J. Ames caused suits at law to be instituted for the recovery of these notes. The complainant thereupon presented a petition to the chancellor, praying for an injunction to restrain them from proceeding at law to recover the notes until the decision upon the appeal. McDermut and D. & J. Ames appeared by their counsel to oppose the application.

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T. Payne, for the complainant.

J. Smith, for McDermut and Ames.

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*THE CHANCELLOR. If the decision of the vice chancellor is incorrect, the defendants, or their assignees who have taken the notes with notice of all the equities between the parties, should not be permitted to go on at law and collect the amount before the case can be disposed of on the appeal. But they allege that Bloomfield threatens to put his property out of his hands if they proceed against him on the notes; and that they have offered to deliver up to him the notes on his assigning over the property of the company, for the stock of which the notes were given. They also object that they are not parties to this suit; that, as the case is now situated, no decree can be made therein which will protect their rights; and that the prosecution of the suits at law is the only means they have in their power to compel the complainant to do equity. Under such a state of facts, I should be doing injustice to these assignees to stay their proceedings at law, even if I have the power to do so on this petition, when they are not parties to the suit. The application for an injunction on the petition must therefore be refused. But as the whole cause is now before the chancellor on the appeal, and all further proceedings in the cause may be carried on before him, the complainant must have leave to file a supplemental bill, setting forth the substance of what is charged in his petition, and such other matters as he may be advised to insert therein, and making all necessary parties. And if he elects to file such supplemental bill, he may apply thereon to the chancellor for an injunction, or for other relief, on such terms and conditions as he may think proper to propose.

March 15th. ON a subsequent day, the complainant having filed a

supplemental bill, he made an ex parte application for an injunction to restrain the defendants therein from proceeding at law.

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THE CHANCELLOR said it was not the intention of the court to allow the complainant to apply for an injunction on the supplemental bill, without notice of the application to the adverse party. That the new defendants were added to the parties on the ground that they had succeeded to the rights of *Snowden since the commencement of the suit; and that due notice of the application for the injunction must therefore be served on the solicitor who represented their interest in this controversy. The chancellor observed that it was not the practice of the court to grant an injunction affecting the rights of a party who had not appeared, without giving him an opportunity to be heard on such application. That if there is no necessity for the immediate interference of the court, the complainant should serve a copy of his supplemental bill, or petition for an injunction, with a regular notice of the application, upon the solicitor of the parties who have appeared in the cause, and who are to be affected by the injunction. If a temporary injunction is necessary in the mean time to prevent serious loss or injury to the complainant, and a sufficient ground is laid therefor, the court directs the petition or supplemental bill to be filed, and grants an order for the defendant to show cause at the next motion or other convenient time, why the injunction applied for should not be granted; and in the mean time a temporary injunction is issued to prevent the anticipated injury. In such cases the temporary injunction falls, of course, if the complainant neglects to serve the papers on the adverse party, and to bring on the application at the time fixed by the court, or as soon thereafter as he can be heard.

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An order to show cause was therefore granted in this case, and a temporary injunction was allowed to stay the

1881. executions at law in the mean time; but the court refused
 Bloomfield to restrain the defendants from proceeding to trial and
 v.
 Snowden. judgment.[1]

[1] On an application for an injunction, the merits may be entered into as far as they are disclosed by the bill, but no extraneous matter can be introduced. *Rose v. Hamilton*, 1 Desau. 137. But the court refused an injunction, when the party applying for relief merely wrote to counsel to defend him, which letter came to hand too late. *Stanard v. Rogers*, 4 Hen. & Munf. 488. A court of equity ought not to interpose by injunction, in the case of a nuisance, unless where the law would not afford an immediate nor an adequate remedy, until irreparable injury might be done. *Wingfield v. Crenshaw*, 4 Hen. & Munf. 474. In an action at law, sounding in damages, after a verdict has been given for the plaintiff, and the court has refused to grant a new trial, a court of equity ought to interpose cautiously. *Meredith v. Jones & Benning*, 1 Hen. & Munf. 585. In a bill for an injunction, where relief might have been had at law, the complainant must state his reasons for not defending himself at law. *Yancey v. Fenwick*, 4 Hen. & Munf. 423. A party applying for an injunction must state that he is remediless at law. *Ib.* *Cutting v. Carter et al.*, 4 Hen. & Munf. 424. An injunction in favor of an executor or administrator on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands, to satisfy the judgment, or any part thereof; reserving to the creditor liberty to show such assets by a scire facias at law. *Hayden v. Goode et al.*, 4 Hen. & Munf. 460. In Virginia, where an injunction has been refused by a chancellor, in open court, a judge of the court of appeals, out of court, may award it, upon a transcript of the record of the chancery court, as well as upon the original bill itself. *Tollbridge v. Freebridge*, 1 Randolph, 206. In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated without this special interposition of the court. *Ib.*, per Johnson, J., 2 Dall. 405. Where the law affords a complete remedy for a wrong done, equity will not interfere to prevent its commission; it is only where the wrong is irreparable that chancery will interpose by injunction. *Trustees of Louisville v. Gwathmey*, 1 A. K. Marsh. 554. Equity will not, in the absence of special circumstances, interfere by injunction to protect a legal right which may be tried at law. *Wooden v. Wooden*, 2 Green's Ch. Rep. 429. If a company claim a right to enter upon land under color of law, without having complied with the requirements of that law, a court of equity will restrain their entry by injunction. *Browning v. Camden & Woodbury Railroad Co.*, 3 Green's Ch. Rep. 47. The court will not by injunction restrain a defendant from the use and enjoyment of a work constructed with the express or implied assent of the complainant, though it prove prejudicial to his rights. *Hulme v. Shreve*, 3 Green's Ch. Rep. 116. A

court of equity will, by injunction, restrain a mortgagee from proceeding at law to sell the equity of redemption in satisfaction of the mortgage debt. *Severns v. Woolstons' ex'rs.*, 3 Green's Ch. Rep. 220. Where an injunction is asked to stay proceedings at law, it is incumbent upon the complainant to show in his bill the state of the pleadings, and the court in which the suit is pending, in order to enable the officer to whom the application is made for the allowance of the injunction, to judge of the propriety of its allowance, and to prescribe the terms upon which the same shall be allowed. *Carroll v. Farmer's and Mechanic's Bank*, Harrington's Ch. Rep. 197. Courts of chancery will not sustain an injunction still to restrain a suit or proceeding previously commenced, in a court of a sister state, or in any of the federal courts. *Ib.* A trivial or unimportant interference, such an one as does not sensibly and plainly interrupt the complainant's enjoyment, will not call for or warrant the restraining power of a court of equity. *Shreve v. Voorhees*, 2 Green's Ch. Rep. 25. See *Waterman's Am. Ch. Dig. tit. INJUNCTION.*

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If it appears that the complainant had no right to revive the suit, the defendant may avail himself of the objection at the hearing.

The provisions of the revised statutes, authorizing the revival of the suit on motion or petition, extend only to those cases, where, by the former practice of the court, the proceedings could be revived and continued by a simple bill of revivor.

Where, by the death of a party, his interest or title to the property in controversy is transmitted to the representative which the law gives, or ascertains, a simple bill of revivor, or a petition under the statute, is sufficient to continue the proceedings in favor of, or against such representative.

Where, by the event which abates the suit, the interest of a party is transmitted by devise or otherwise, so that the title to the property, as well as the person entitled thereto, may be a subject of litigation in the suit, an original bill, in the nature of a bill of revivor and supplement, is necessary.

The provision of the revised statutes authorizing the representatives of a deceased complainant to amend, relates only to such amendments as the deceased party might have made, if living; and does not authorize the insertion of any matters by way of amendment which have arisen since the filing of the original bill.

Where the representative of a deceased complainant applies for an order to revive, under the statute, he should give notice of the application to the

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surviving parties who have appeared in the suit. And the order of revival should state the particular character in which he is permitted to revive and continue the suit; and the subsequent proceedings are to be entitled accordingly.

Where a person, claiming to be devisee of a deceased complainant who had filed a bill to redeem, obtained on an ex parte motion an order to revive the suit in her favor, *held*, that the defendant might, at the hearing, object that the suit was not legally revived.

On a general devise of all the testator's estate, real property acquired after the making of the will descends to the heir at law, and does not belong to the devisee.

The executrix of the mortgagor or of his grantee, having no interest in the premises, is not entitled to redeem; and cannot revive a suit for that purpose commenced by the testator in his life time.

Where an executor applies to revive a suit, he must show that he has taken probate of the will of the decedent.

- b. SHERMAN, the defendant, is in possession of a lot of land, claiming title to the same under a decree of foreclosure upon a mortgage executed by W. Brady and wife, in 1813. At the time the bill was filed to foreclose that mortgage, Edward Douglass was a judgment creditor of Brady, but
 [*359] *was not made a party to the suit. He shortly afterwards, and before the decree of foreclosure was obtained, became the purchaser of Brady's interest in the premises, under a sheriff's sale upon his judgment. In April, 1820, he filed his bill in this suit against Sherman to redeem. The cause was heard on pleadings and proofs; and in November, 1824, the chancellor made a decretal order, referring it to a master to ascertain the amount due on the mortgage, the costs of foreclosure, and the amount of the expenditures which the defendant had made on the premises since his purchase; the value of the premises, and of the rents and profits thereof, &c.; and that the complainant proceed upon the reference within three months, or that the bill be dismissed. On the 11th of February, 1825, the complainant died; and on the first of March thereafter, Hester Douglass, his widow, on filing an affidavit of that fact, and that he had made a will by which all his real and personal estate was devised to her, and that she

was about to take upon her the execution of the will, obtained an order, ex parte, that her name should be inserted as complainant in the suit, and that the action proceed as in ordinary cases. A few days afterwards a copy of this order was served on the defendant, together with a summons to attend the master on the reference. The master having died, the order of reference was delivered to another master, who made his report in October, 1829. To this report exceptions were taken, and the cause now came on to be heard on those exceptions and upon the equity reserved.

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J. Radcliff, for the defendant, raised a preliminary objection, that the suit had not been properly revived. He contended that the present complainant was not the proper party to be substituted in the place of the deceased complainant; and that the provisions of the revised statutes in relation to revivals, had not been complied with. Sufficient did not appear to show that the present complainant had the right to redeem. The intestate may have been an alien. The heir at law might hereafter come in and claim the right to redeem; and we have had no opportunity to make this objection before. The order for revival was obtained upon an ex parte application. And he also insisted that if the *complainant was allowed to file a bill in the nature of a bill of revivor and supplement, it could only be done upon payment of costs. (*Shepherd v. Merrill*, 3 John. Ch. R. 423.)

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The counsel also read an affidavit of the defendant stating that he had, within a very few days, discovered for the first time that the will under which Hester Douglass claimed the premises as devisee, was executed nearly six years before the testator had any interest in the premises. He therefore insisted that she had no interest in the controversy, and was not entitled to revive or prosecute the suit.

1881. *J. Smith*, for the complainant, insisted upon her right to revive the suit both as executrix and as devisee; and that the defendant was precluded from raising the objection that the suit had not been properly revived after having so long submitted to the order substituting her as the complainant in the suit.

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THE CHANCELLOR. It appears to be well settled that the defendant may raise the objection at the hearing that the suit has abated as to some of the parties, whose rights should be before the court to enable it to make a proper decree. And if it appears that the suit is not properly revived, or that the complainant had no right to revive, he cannot have a decree. (*Russell's heirs v. Craig's devisee*, 3 Bibb, 377. *Harris v. Pollard*, 3. P. Wms. 348. *Lasco and others v. Moyers*, Bumb. 144.) The 107th section of the title of the revised statutes relative to this court, (2 R. S. 184,) and the subsequent sections of the same article, apply only to those cases where, by the former practice of the court, the proceedings could be continued by a simple bill of revivor. The representatives alluded to in those provisions are such as become so by operation of law on the death of a party; and not those who become so by devise, grant, or other title which may be contested in the suit. In the language of Lord Redesdale: "Wherever a suit abates by the death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir at law, executor or administrator, so that the title cannot be disputed, at least in the court of chancery, but the *person in whom the title is vested is alone to be ascertained, the suit may be continued by a bill of revivor merely." (Mitf. Pl. 4 Lond. ed. 69.) So also in the case of the marriage of a female plaintiff; as the sole fact to be ascertained is the person of the husband, a simple bill of revivor is all that is necessary to continue the suit. But where, by the marriage settlement, the in-

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st of the property in controversy is vested in trustees, the separate use of the wife and her issue, a bill of revivor alone is not sufficient; but a supplemental bill is necessary to bring the interest of the trustees, &c. before the court. (*Merrivether v. Mellish*, 13 Ves. Rep.

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) And in all cases where, by the death of a party, suit is abated, and his interest or title to the property in controversy is transmitted by a devise, or in any other manner, so that the title as well as the person entitled to be a subject of litigation in this court, the suit can be continued by a bill of revivor. In such cases an original bill, in the nature of a bill of revivor and supplement, must be filed, on which the question of title may be put in issue and litigated. (*Huet v. Lord Say and Sel. Cas. in Ch. 53. Ryland v. Green*, 4 Bro. P. C.

Backhouse v. Middleton, 1 Cas. in Ch. 174. *Rush v. heirs v. Craig's devisee*, 3 Bibb, 377. *Harrison v. Ley*, Comyn's Rep. 589.) But in such cases, the purchaser or devisee will be bound by the former proceedings in the original cause, to the same extent that the heir would have been upon a bill of revivor, (2 Vernon's Rep. 548.) It sometimes becomes necessary, on a bill of revivor, to call for an answer; as in the case of an executor or administrator of a deceased defendant, to ascertain whether he has assets to pay the complainant's demand. (Mitford's Plead. 4 London ed. 76. *Brown v. Duke of Chandos*, Vern. & Scriv. Rep. 109.) That as well as that of a necessary discovery from the person who has become the personal representative of a deceased defendant, was probably intended to be provided for by some of the new provisions incorporated into the revised statutes. (2 R. S. 184, § 113, 114.) The provision in the 115th section of the statute, authorizing the representatives of a deceased complainant to amend the bill, did not have been intended to authorize an assignee or successor to amend the bill by stating the nature of their

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1831. title; for it is well settled that nothing can be inserted in
 Douglass the original bill, by way of amendment, which has arisen
 v. subsequent to the commencement of the suit. (*Usborne*
 Sherman. *v. Baker*, 2 Mad. Rep. 389.) The object of that provision
 undoubtedly was to put the executors, administrators, or
 heirs of the deceased complainant, on the same footing as
 to amendments, as the decedent was at the time of his
 death; and not to compel them to file a supplemental bill
 to obtain such alterations in the original bill, as could be
 properly introduced in the form of amendments.

The conclusion at which I have arrived, upon a full examination of all the authorities on the subject, is, that this was not a case in which the suit could be revived by making Hester Douglass complainant, as the devisee of her deceased husband, under the provisions of the statute then in force; which, in this respect, were the same as the present law. As executrix, she had no right to revive the suit, or to redeem the land which belonged to the heir or devisee. (*Smith v. Manning*, 9 Mass. Rep. 422. *Lomax v. Bird*, 1 Vernon, 182. *Grant v. Duane*, 9 John. Rep. 612.) And if the usual decree should be made in such a case, a neglect to redeem within the time limited would be no bar to the devisee or heir at law. Neither was this suit revived in her name as executrix; for it appears on the face of the order that she had not yet proved the will, although she intended to do so thereafter.

The whole difficulty has arisen from the loose and irregular practice, which has in some cases been adopted, of permitting a person claiming a right to revive to be substituted in the place of the deceased complainant, under the statute, without any notice to the other parties who have appeared in the suit. The proper course to be adopted by the heirs or personal representatives of a deceased complainant to revive the suit, under the 115th section of the revised statutes before referred to, is for them to apply to the court upon a petition or affidavit, stating the death of the complainant, and showing that they in fact

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sustain the character in which they claim the right to revive. And if they claim the right to *revive as executors, it should appear that they have taken probate of the will. (1 P. Wms. 753.) Due notice of the application should also be given to the solicitors of the other parties who have appeared in the cause, and who do not join in the application, so as to give them an opportunity to be heard as to the right of the applicants to revive. The order of revival should also state the particular character in which they are permitted to revive and continue the suit; and the cause is to be entitled accordingly, in all subsequent orders and proceedings therein. The original pleadings and proceedings are not however to be altered or amended by inserting the names of the new complainants. Such is not the meaning of that clause of the statute which authorizes the new complainants to amend the bill.

The order to revive in this case was not authorized by the statute, and was therefore irregular in form; and no decree can be made in favor of the present complainant, on any character, until that irregularity is corrected. If the defendant is correct in supposing that the will, by which all the real estate of Edward Douglass was devised to his wife, was made long before he acquired any interest in this property under the sheriff's sale, she has no right to redeem in the character in which she has attempted to revive the suit, as nothing passed to her under the will as devisee. (*Thompson v. Scott*, 1 M'Cord's Ch. Rep. 2.) In that case the right to continue the suit belongs to the heir if there is one capable of taking by descent; and if there is none, it either belongs to the people of the state, or is escheat, or it is extinguished.

It was suggested on the argument, that no injury could arise to the defendant by a decree in favor of the present complainant, as she had obtained a conveyance from the heir at law of the decedent since his death. Whether such a conveyance would be valid pending this litigation, and while the defendant was holding the premises ad-

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[*364] versely to such claim; and whether the person making the conveyance is capable of taking by descent, and on any other questions of a like character, cannot be passed upon properly under this form of proceeding. The correct mode of litigating such questions is upon a bill, where the defendant may put the questions of fact in issue and examine witnesses thereto in the usual manner. Even on a proper application by an heir at law, to revive under the statute, if either his legitimacy or his alienage was really a disputed question, the court, in its discretion, might deny the application, and direct a formal bill of revivor to be filed; so as to enable the defendant, either by plea or answer, to contest his right to revive.

The order of the first of March, 1825, and all subsequent proceedings, must be set aside as irregular and erroneous but without costs to either party, as the defendant was equally in fault with the present complainant, in proceeding under that order instead of moving to set it aside. Mrs. Douglass must be permitted to file a bill in the nature of a bill of revivor and supplement, if she shall be advised so to do, for the purpose of setting up her claim to continue the suit and to redeem, either as devisee under the will, or as the assignee or grantee of the heir at law of her late husband; and if she does not file such bill within three months, she is to be thereafter precluded from any further proceedings against the defendant, founded on the decretal order made in this cause during the life of her husband.

If any other persons, not now before the court, have the right to revive, I cannot at this time make any order affecting them. The defendant, if he wishes to terminate the suit as to them, must either proceed to revive, or take some other step on his part to preclude their right, or wait until it is terminated by the lapse of time. Probably he may, on a proper application, be entitled to such an order as was granted in *Pells v. Coon*, (1 Hopk. 450;) requiring the alleged heir at law, or the attorney general, to proceed

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in a limited time, if they shall be advised so to do, or they be precluded.

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where an execution is in the hands of the sheriff at the time of the statement of the suit by the death of the defendant, the proceedings upon the execution will not be stayed, as it can be executed without any other order from the court.

a new execution is necessary, or any other proceeding which is either really or constructively to be done by the court, the proceedings must be suspended until the judgment is revived by *scire facias*.

that the same rules prevail in equity; at least in favor of parties who have acquired rights under an execution, issued upon a decree prior to the abatement of the suit.

for the purchaser at a master's sale, under similar circumstances, should obtain a valid title where an order of confirmation is necessary for the sale to become absolute. *Quere.*

a decree cannot be carried into effect without a direct application to the court, an order for that purpose cannot be made after an abatement by the defendant's death, and before the suit is revived.

that anything which could be legally urged by plea or otherwise, in defence to a bill of revivor, constitutes a valid ground of objection in order to revive, under the statute.

there was an application to stay the proceedings on a March 15th
the day of sale, upon the ground that the suit had abated by the death of one of the owners of the premises. The facts are stated in the opinion of the court.

A. Foot, for the petitioners.

F. Hoffman, for the assignee of the decree.

THE CHANCELLOR. A general decree was made in this case, which exempted a part of the mortgaged premises from a sale, on account of particular equities which existed in favor of the defendants, who were the owners of

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those portions of the premises. The residue of the premises appears to have belonged to the defendants Stevens and Aikin; and Slee also held a mortgage on the part belonging to Aikin. The whole of that residue was ordered to be sold under the direction of master Drake, and the proceeds thereof to be applied to the payment of the mortgage money and costs; and the *balance, if any, to be brought into court. The decree was made in June, 1823, and the order of sale was soon afterwards put into the hands of the master to be executed. Chapman, one of the trustees of Mrs. Dyett, who had purchased Stevens' interest in the premises about the time of the decree, subject to this incumbrance, soon afterwards paid the amount of debt and costs to the complainants, and took an assignment of the decree to the Life and Fire Company, to secure them for a loan of bonds which he had obtained from that company, and by the sale of which he had raised the money paid to the complainants. The proceedings under the decree were then suspended. The master has since died; so also has Aikin, one of the defendants, who was part owner of the premises directed to be sold. The interest of Mrs. Dyett's trustees and of Chapman in the premises, has since been sold, under an order of this court, and purchased by Bache. He insisted that he purchased under the advice of counsel that this incumbrance or decree could never be enforced against the premises. The decree has passed from the Life and Fire Company, by assignment, to Jacob Barker; and is now held by T. L. Wells, in trust for him, or for the estate of Mrs. Dyett, or for some other persons, whose interest does not appear in the proceedings. The suit has never been revived; but in June last, Wells presented an ex parte petition to the court, showing the several assignments by which the interest of the complainants was vested in himself, and the death of master Drake; and thereupon, with the assent of the former solicitor, obtained an order substituting himself as the complainant's solicitor, and authorizing any

master to proceed and execute the decree. He was proceeding to sell under this order, when Bache presented the present petition to stay the sale, on the ground that the proceedings were irregular, as the suit had abated by the death of Aikin. The petitioner also asks that the parties may be brought before the court, who are now interested in this litigation by assignment or purchase. The widow and children of Aikin have also presented a similar petition; but as that appears to be merely in aid of the petition of Bache, it cannot be material to notice it particularly. It appears that part of the factory *lot was conveyed by Slee, as early as May, 1815; and the conveyance to Aikin, according to Slee's affidavit, was in December thereafter. It therefore follows from the principles established in *Clows v. Dickinson*, (5 John. Ch. Rep. 225,) and other cases, that the owner of the factory has an equitable right to have the proceeds of the Aikin lot applied in satisfaction of this mortgage, prior to the application of the proceeds of the premises, which were conveyed to Slee at a previous date. Bache's claim to stay the proceedings would therefore have been equally strong without the aid of these new allies, if the Aikin lot cannot be sold without reviving the suit.

I am not prepared to say there is no case in which the master would be permitted to go on and perfect a sale after the death of a party. At law, if an execution is in the hands of the sheriff at the time of the abatement of the suit by the defendant's death, so that he can go on and execute the judgment without any further order or direction of the court, the abatement of the suit will not stay the proceedings under that execution. But if a new execution is required, or any other proceeding is necessary, which is either actually or constructively to be done by the court, the proceedings must be suspended until the judgment is revived by scire facias. In *Warham v. Broughton*, (1 Ves. sen. 181,) Lord Hardwicke seems to recognize this distinction as applicable to proceedings in

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this court. It certainly may be sanctioned, in favor of parties who have obtained rights under an execution issued upon a decree, previous to an abatement. But it may be doubtful whether the purchaser would obtain a valid title under a master's sale, under similar circumstances; as the sale in most cases requires an order of confirmation before it becomes absolute. Such an order, though entered *ex parte* in the register's office, is constructively the act of the court; as much so as the issuing of an execution, by the clerk, in a court of law. Where the decree cannot be carried into effect without some positive act of the court supplying a defect in the proceedings or decree, it is evident there must be a revivor, or some other proceeding in the nature of a revivor *or *scire facias*, before the benefit of the decree can be obtained.

In this case, the decree directed the sale to be made by a particular master, by name. That master is now dead, and has been for several years. It therefore became impossible to carry the decree into effect, without a direct application to the court for a new order, authorizing another master to proceed and sell the mortgaged premises. Such an order could not be regularly made, while the suit was abated by the death of a defendant whose property was to be sold under the decree. The order of the 14th of June last, so far as it authorized another master to proceed and sell the mortgaged premises under the decree, was irregularly and improvidently entered, and must be set aside. All proceedings under the decree, except such as may be necessary for the preservation of the property, must be suspended until the suit is revived.

Whether this is a case in which the suit can be revived on the petition of the original complainants, under the statute, or whether the assignee must file an original bill, in the nature of a bill of revivor and supplement, against the parties who now own the property, are questions which I am not prepared to decide without further argument. The revival by order can only be adopted where a simple

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bill of revivor was sufficient to revive the suit before the statute. It seems to follow that the same objections which might be raised by plea or demurrer to a bill of revivor, may be shown in opposition to a petition to revive under the statute; and if the assignment by the Washington company could be pleaded in bar to a bill of revivor filed by them, it is evident that the assignee must proceed by original bill, in the nature of a bill of revivor and supplement, in his own name, making all necessary parties thereto.[1]

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[1] Where the right of a devisee to revive and continue the proceedings in the original suit, as the proper representative of the complainant in such suit, is admitted, or has been established by a decree founded upon the new matter, the new complainant is entitled to the same benefit of those proceedings, so far as his interest as devisee is concerned, as if he had been in a situation to continue those proceedings by a simple bill of revivor. *McCosker v. Brady*, 1 Barb. Ch. Rep. 329. *Brady v. McCosker*, (on appeal,) 1 Com. 214. In case of abatement by death of the plaintiff, his devisee cannot have a bill of revivor, but can only have the benefit of the original proceedings, and avail himself of the new facts necessary to be stated, by an original bill in the nature of a bill of revivor and supplement. *Brady v. McCosker*, 1 Com. 214, 19. Where a bill was filed against a defendant as executrix of her deceased husband, to reach property which she had received as such executrix, but which in equity belonged to the complainants, and she died after a decree had been made in their favor; held, that the surviving executor of the husband, but who was not made a party to the original suit, could only be brought before the court by an original bill in the nature of a bill of revivor and supplement; and that the filing of a mere bill of revivor against him was improper. *Evertson v. Ogden*, 8 Paige, 275. Where a bill of revivor filed against a defendant shows no title in the complainant to revive, as against him, he should demur to the bill instead of pleading thereto. *Ib.* To entitle a defendant to file a bill of revivor, where the adverse party neglects to revive, such defendant must show that he has an interest in the revival of the suit. *Anderson v. White and others*, 10 Paige, 575. A defendant may revive in all cases, after decree, where he can have a benefit from the further proceedings in the suit, in case the adverse party will not himself revive. *Ib.* Where there is a decree against a defendant, and the suit then abates by the death of the adverse party, the defendant cannot appeal from such decree until the suit is revived. Such defendant has therefore a right to revive the suit, in case the adverse party neglects to revive for the purpose of enabling him to appeal, if he has no other remedy and an appeal will lie. *Ib.* Where

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a suit in chancery abates by the death of all the defendants therein, before they have become entitled to an interest in the further prosecution of the suit, by a decree or decretal order of the court, the representatives of such defendants cannot file a bill against the complainant to revive the suit. *Soulliard v. Dias*, 9 Paige, 393. The provision of the New York revised statutes authorizing the defendants in the suit, or the surviving defendant, to revive the suit, where the complainant or his representatives neglect to revive the same, does not extend to the case of an abatement of the suit, by the death of all the defendants therein. *Ib.* A bill of revivor and supplement is a compound of a supplemental bill and bill of revivor, and not only continues the suit which has abated by the death of plaintiff, &c., but supplies any defects in the original bill, arising from subsequent events. *Westcott v. Cady*, 6 Johns. Ch. Rep. 342. Where one of several defendants dies, the plaintiff cannot file a new original bill against the representatives of the deceased party and the others, but a bill of revivor only against such representatives; and even if he might under other circumstances elect to file a new bill, he cannot do it where an answer had been put in by the party since deceased. *Nicoll v. Roosevelt*, 3 Johns. Ch. Rep. 60. Where the lands against which the decree in an original suit is attempted to be enforced, have been transferred to persons who were not parties to the original suit, that suit can only be revived by an original bill, in the nature of a supplemental bill of revivor; and is, therefore, subject to all the defences appertaining to original bills. *Tallman v. Varick*, 5 Barb. S. C. Rep. 277. The defendants, in such a suit, have a right to set up, by way of answer, and to insist upon any defence to the relief prayed for, which may exist in the case. *Ib.* Some of the distinctions stated between bills of review, revivor, and supplemental and original bills in chancery. *Kennedy et al. v. Georgia State Bank et. al.*, 8 Howard's Rep. 586. Where a vendor tenders a deed, files a bill for specific performance, and dies, the executor can revive without bringing the heir at law before the court. If, however, the sufficiency of the deed is likely to be called in question, the executor had better file a bill of revivor and supplement, making the devisee a party defendant. *Daniels v. Brodie*, 3 Edw. Ch. Rep. 275. Where a bill, cross bill, and supplemental bill in the nature of a bill of review, between the same parties, and relating to the same subject, are all abated by the death of one of the parties, the whole proceedings may be revived by one bill of revivor. The party reviving will not therefore be allowed the costs of two or more separate bills for that purpose. *Wilde v. Jenkins*, 4 Paige, 481. See Waterman's Am. Ch. Dig. tit. BILL OF REVIVOR.

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*EAGER v. WISWALL AND PRICE.

Where the master reported an answer insufficient, and upon exceptions to his report the same was confirmed by default, and a second answer was referred to the master upon the old exceptions, *held* that the defendants were precluded from objecting that the original objections were not well taken.

If an answer is insufficient, the complainant must raise all his objections to it in the first instance, and he will not be permitted to make any objections to the second answer which were raised by exceptions to the first. If any of the exceptions to an answer are not well taken, the defendant must have that question settled in the first instance, and before he submits to answer further, or he will be compelled to answer these exceptions fully, unless the court thinks proper to relieve him, on terms, from the consequences of his neglect.

It is a matter of course to allow the complainant to inspect the books and papers of the defendant, referred to in his answer, and thus made a part thereof. And the defendant may be compelled to produce them within a reasonable time, although they are in the hands of his agent in a foreign country.

THIS cause came before the court on exceptions to the master's report as to the insufficiency of the further answer of the defendant Wiswall; and also upon a petition of the complainants for the production of certain books and papers referred to in the answer and in the further answer. March 15th.

H. Bleecker, for the complainants.

D. Selden, for the defendant Wiswall.

THE CHANCELLOR. If the exceptions to the first answer were well taken, it is evident the master is right in reporting the further answer is insufficient in the matters particularly mentioned in his report. It is however insisted that some of the matters to which those exceptions relate are immaterial and irrelevant, and that the first answer was sufficient. I am inclined to think this was the fact as

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 Eager rial to inquire whether the defendant is not preclud
 v. from making this objection by the course which has be
 Wiswall. pursued in relation to the exceptions.

[*370] *The original exceptions to the answer for insufficien
 were allowed by the master. The defendant then ex
 cepted to the report, for the purpose of bringing the que
 tion before the court. The latter exceptions were noticed
 for hearing on the part of the complainants, and the de
 fendant having neglected to appear and argue the same,
 those exceptions were overruled; and the report of the
 master was confirmed. He now seeks to bring the same
 questions before the court, by exceptions to the master's
 report on the reference of the further answer on the old
 exceptions.

In *Crisp v. Nevil*, (1 Eq. Ca. Abr. 35, 1 Ca. in Ch. 60,
 S. C.) the defendant submitted to the master's report,
 allowing the exceptions, and then put in a further answer
 which met all the charges in the bill; but, in truth, the
 exceptions went beyond the bill. On a reference of the
 second answer, the master reported it insufficient, because
 the exceptions were not fully answered. The defendant
 then excepted to this last report of the master. But Lord
 Clarendon held him precluded in consequence of the first
 report which had been submitted to, and decided that he
 was bound to answer all the matters of the exceptions.
 This appears to be a case directly in point, although the
 case under consideration is stronger. Here the master's
 first report was in fact confirmed, on exceptions thereto;
 and that order, though obtained by default, still remains
 in force. It is true that in the subsequent case of *Finch v.*
Finch, (2 Ves. sen. 491,) Lord Hardwicke held that the
 defendant was not absolutely precluded from raising a
 question, on the second report, which might have been
 raised by excepting to the first; although he admits it is
 a singular way of bringing the question before the court.
 I should infer from the language of the lord chancellor

same practice existed at that time in the master's relation to the reference of a first answer, which on afterwards very properly corrected, in relation to the further answer in the case *Rowe v. Gudgeon*, 1 Beam. 331.) That practice was for the master to deem the answer insufficient if he found one of the points thereto well taken, without inquiring whether it was not sufficient as to the other points excepted to. The general principle of the court is that if the answer is deficient, the complainant must raise all his objections thereto in the first instance; and he will not be permitted to raise any objections to the second answer which was made by exceptions to the first. This has indeed been decided so far as to preclude the party from raising an objection to the answer of the defendant to an amended answer, upon the same principle, he might have excepted to the original answer, but had neglected so to do. (*Leighton*, 2 Sim. & Stu. 234.)

The principle is correct when applied to the neglect of the complainant to bring his objections before the court at the first opportunity, it is equally correct as applied to the defendant. In neither case is the party absolutely excused; because the court might, in a proper case, relieve him from the consequences of his neglect, upon application. And if the court saw that it was utterly impossible for the defendant to answer the exceptions in any different manner from what he had before done, or that by requiring a further answer he might seriously criminate himself, he might be excused from answering further. In that case, however, it would be perfectly reasonable that he should pay the costs of the second reference. Here there is no fault or fault in making a perfect answer to these exceptions, although it may subject the party to some little inconvenience, as well as to costs. If he wished to avoid this fault his remedy was by applying to open the reference, which his exceptions to the first report of the master were overruled. The exceptions to the last report

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1831. must therefore be disallowed with costs; and the defend-
 Hammersley ant must pay the costs and put in his further answer within
 v. ten days after notice of the order overruling his excep-
 Barker. tions to the report, as fixed by the master.

The petition for the production of the books and papers referred to in the answer and further answer, must also be granted. It is a matter of course to permit the complainant to have the inspection of deeds, books and papers, referred to in the defendant's answer, and thus made a part thereof. If they are within his power, or under his control, he must produce them within a reasonable time, although they are in the hands *of his agent in a foreign province. (*Farquharson v. Balfour*, Turn. & Russ. Rep. 190, 206. *Freeman v. Fairlie*, 3 Meriv. 44.) Those which are in the actual custody of the defendant, or within his power in New York, must be produced within ten days; and those which are out of the state, within such reasonable time as the master may allow for that purpose.

HAMMERSLEY & DYETT v. BARKER & CHAPMAN.

If, by the complainant's own act or procurement, the object of the suit is defeated, he cannot be permitted to discontinue without costs.

The provision in the revised statutes, which exempts the party dismissing his own bill from costs in certain cases, only extends to those cases where prima facie he would not be chargeable with costs on a decree dismissing the bill at the hearing; as in the case of suits by executors in right of their testators.

If the complainant, prima facie, would be chargeable with costs if the suit was decided against him at the hearing, the court will not examine the whole merits of the cause merely to ascertain whether there are any equitable circumstances which might excuse him from the payment of costs.

March 15th. THIS was an application on the part of the complainants for leave to dismiss their bill as against William Chapman without costs.

H. W. Warner, for complainants.

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C. F. Grim, for W. Chapman.

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Barker.

THE CHANCELLOR. The complainants in this cause filed their bill to obtain relief against the assignment of a mortgage and a decretal order of sale thereon, at that time in the hands of Jacob Barker; and which was an incumbrance on the manufactory which formed the subject of the litigation between them and Chapman in another suit. Chapman was made a party; and distinct relief was prayed against him, if they did not succeed in obtaining the relief asked for against the other defendants. The factory has been sold, on the application of these complainants, and against the wishes of Chapman. A third person became the purchaser; and as they allege, in trust for Chapman. Since that sale, as appears from the papers on the part of Chapman, the *complainants have made some arrangement with the other defendants in this suit by which the mortgage and decree have been assigned to T. L. Wells for the benefit of the complainants, and he is now seeking to enforce the same against that part of the factory on which it is a lien. They have also made an agreement with the other defendants in this cause by which the bill has been or is to be dismissed against them without costs. The complainants now ask for leave to dismiss their bill, without costs, as against Chapman also. It is evident from this state of the case that they can have no object in going on with the suit. But Chapman has been put to great expense in defending himself against their claim, and the only questions seem to be whether the court is authorized to permit them to dismiss without costs; and if so, whether this is a proper case to exercise the power. In ordinary cases in this court costs rest entirely in discretion. But as the law has explicitly provided for this particular case, of a complainant's dismissing his own bill, it has frequently been de-

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cided that if the object of the suit had been defeated by the complainant's own act or procurement, he cannot dismiss his bill without paying costs to the defendant. The revised statutes have not altered the law, on this subject, by excepting those cases where, according to the practice of the court, on a decree against the complainant at the hearing the defendant would not be entitled to costs. That provision was only intended to conform the law to the construction which had been given to the former statute. It includes those cases only in which, prima facie, the complainant would not be liable for costs, although he failed in the suit; as in the case of an executor or administrator suing in right of his testator or intestate. It never could have been the intention of the legislature to compel the court to examine and decide upon the whole merits of the complainant's original claim, for the mere purpose of ascertaining whether he would have been liable for costs at the hearing. I see nothing in this case to take it out of the rule which has been considered the correct construction of the statute in other cases. It is therefore unnecessary for me to look into the merits to see whether the complainants could have been excused from the payment of costs at the hearing.

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*The motion to dismiss without costs must therefore be denied; but the complainants are at liberty to dismiss their bill against Chapman, on payment of the costs of his solicitor, to be taxed. If they do not think proper to adopt that course within thirty days, Chapman is to be at liberty to take such steps as he may deem necessary to terminate the suit. The costs of opposing this motion, in either case, are to abide the event; and may be taxed by the solicitor of Chapman as costs in the cause. .

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of Frita.

IN THE MATTER OF FRITS AND OTHERS, INFANTS.

The revised statutes have not divested the court of chancery of any of its powers as the general guardian of the persons and estates of infants; neither do they prevent the chancellor, in court, from making an order for the appointment of a guardian, or next friend, according to the former practice of the court. But where it can be done consistently with the forms of the court, and without great inconvenience and expense, the court will, in the exercise of its powers, conform to the spirit of the statutory provisions.

The revised statutes do not, in terms, require a next friend to be appointed for an infant plaintiff who joins with an adult, but it is as necessary in that case to have a next friend appointed as in the case of a sole plaintiff.

The provision which directs the officer making the appointment of a next friend to take security to the infant in certain cases, extends to cases where the infant sues jointly with others.

Where a great number of infant legatees had a common interest in the prosecution of a suit, the court, on the application of the guardians of some of the infants, in behalf of all the rest, appointed a next friend to prosecute a suit in the names and for the benefit of all the infant legatees.

THIS was a petition for a special order for the appointment of a next friend for the infant grand children of J. Miller, deceased, who were legatees named in his will; to enable them to join with the adult legatees in a bill for the sale of certain real estate of the testator, to satisfy their legacies charged thereon. The petition stated that the testator, by his will, gave to Mary Frits and three other persons legacies of one hundred dollars each, and to the petitioner, and the other grand children of the testator, indiscriminately, three hundred dollars, to be divided among them equally; that the *payment of the legacies was charged exclusively upon a farm which descended to the heirs at law of the testator; that among the legatees were thirty infants, of different ages, from three to twenty, residing in various and distant parts of the state, besides several adults; that a sale of the property was

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necessary to satisfy the legacies; that all the legat were desirous to have a decree for the sale of the far and that it would be very inconvenient and expensive the parties to procure the appointment of a next frie for each of the infants, by an order of an officer out court.

I. McConihe, for the petitioner.

THE CHANCELLOR. The prayer of the petitioner in thi case is perfectly reasonable and proper; as it is pretty evident, that if these infants were all made defendants, and were compelled to put in answers by their guardians, in the usual manner, the expense would be more than the whole amount of their legacies, and probably more than the value of the land on which those legacies are charged. The only question is whether the revised statutes have taken away the power which this court formerly possessed, of directing a suit to be brought for the benefit of an infant, without any direct application from him; or where he is incapable, from his tender years or otherwise of presenting a petition. The second section of the tit of the revised statutes, relative to proceedings by a against infants, (2 R. S. 446,) provides, that before a process shall be issued in the name of an infant wh sole plaintiff in any suit, a competent and responsible son shall be appointed to appear as the next frien such infant, in such suit, who shall be responsible fo costs thereof. The third section directs the man which such appointment shall be made. Notwith ing these sections do not in terms apply to suits w/ infant is joined with an adult plaintiff, the appoi of a next friend is as necessary to protect the righ infant in the one case as in the other; although latter case the defendant would have a remed costs against the adult complainant. The fift which authorizes the officer making the appoi

security to the infant, *in certain cases, extends to cases of suits brought by the next friend of an infant, whether the infant is sole plaintiff or joined with another. The mode of appointment prescribed by the statute must be adhered to in all cases where a next friend is appointed an officer out of court. But a literal compliance with the fourth section is not practicable in all cases; as it may be necessary to commence a suit in behalf of an infant who is too young to sign a petition, or even in behalf of a child in ventre sa mere. In such a case I think it would be competent for some relative or friend to present a petition in behalf of the infant.

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On a careful examination of the statute, I am satisfied that it was not the intention of the legislature to divest the court of any of the powers it before possessed, as the general guardian of the persons and estates of infants; or to prevent the chancellor in court from making an order for the appointment of a next friend of an infant complainant, or a guardian ad litem for an infant defendant, which had been usual before these statutory provisions were made. But this court has already decided that in the exercise of its power in this respect, it is proper to conform to the spirit of the statutory provisions, so far as it may be done consistently with the forms of the court, and the convenience of suitors, and without unnecessary expense. (*Cherbacker v. Defreest and others*, ante, 304.)

In this case it is proper that a suitable person should be appointed by the court for the purpose of joining in the suit with the adult legatees. But the person proposed is an administrator, and may be a necessary party, to render an account of the personal estate. As it is possible that they may have to represent some interests adverse to that of the infants, a different person must be selected as their next friend. Mr. McConihe, the solicitor for the adults, was therefore appointed next friend of the infants. It would be useless and unnecessary expense to execute a bond on each of the thirty infants in this case. And as the

1831. premises must be sold under the direction of a master,
 Johnson a sale is decreed, to pay the legacies, the court can
 v. trol the fund without suffering it to pass into the hand
 Thomas of the next friend. The security may therefore be dis-
 pensed with, under the particular circumstances of this
 case.

JOHNSON v. THOMAS.

Where a cause was argued before a former chancellor, but before a decision therein he went out of office, and also the complainant died; *held*, that the cause could not be re-argued before the new chancellor without being revived.

If the whole ground of the suit has been removed by the death of the complainant, the court will not hear an argument merely to determine a question of costs.

In a suit at law, if the dowress dies before her right is established, her personal representatives have no remedy either for costs or for the money profits.

If the husband died seized, the death of the dowress, pending a suit in this court for her dower, will not deprive her personal representatives of the arrears due at the time of her death; but they may revive the suit for the purpose of obtaining such arrears of dower.

But where the husband did not die seized of the premises, if a suit in chancery abates by the death of the complainant before her right to dower is established, the personal representatives are not entitled to any arrears of dower, and therefore cannot revive.

The revised statutes, however, have now given the widow a better remedy for her dower, and a more extended right to damages for arrears, than was provided by the former law.

April 5th. THE complainant in this cause filed her bill to recover dower in certain real estate of which her husband was seized during his life time. During her coverture, she, in conjunction with her husband, mortgaged the premises to B. Walker, which mortgage still remains unsatisfied in the hands of Walker's executors and trustees, under whom the defendant is in possession. The premises were also sold on a judgment against the husband, in his life time, and were purchased at such sale by Walker. This

Interest likewise passed to Walker's executors and trustees under his will. A cross-bill was also filed by the defendant and the executors of Walker, setting up their rights under the mortgage executed by the complainant and her husband. The causes were heard before the late chancellor, in 1826; but before they were decided, the complainant died. The executor of the complainant now *presented a petition to the present chancellor, praying that a decree might be entered in the name of Ann Johnson, as of the time when the cause was originally argued, to enable him to obtain the mesne profits and the costs; or that the suits might be revived in his name and brought to a hearing, for the same purpose.

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B. F. Cooper, for the executor. This court has decided, that where a defendant dies after the argument and before the decision of a cause, the decree will be entered so as to relate back to the term when the argument was heard. (*Campbell v. Mesier*, 4 John. Ch. R. 334, 342. 2 Fowler's Exch. Prac. 169. *Davis v. Davis*, 9 Ves. 461. 2 Mad. 398.) There cannot, on principle, be any difference between the case of a defendant's and a complainant's dying before the decision of a cause; but if there be, the reason is stronger in favor of a complainant than a defendant; for, on the latter, the decree may be supposed to operate injuriously, and it can make no difference with him whether the complainant or his executor receive the benefit. If a bill of interpleader be filed, and the complainant die after trial directed between the defendants, a bill of revivor is not necessary; for the defendants themselves are virtually defendants and plaintiffs, and may proceed against each other. In this case there was a cross-bill, in which Ann Johnson was defendant, in relation to the same matter; and she being both plaintiff and defendant, the case is perhaps within the principle of the above rule. (Anon. 1 Vern. 351. 2 Comyn's Dig. tit. Chan. Bills of Revivor, p. 410.) At

1831. common law, the death of a sole plaintiff or defendant, before final judgment, would have abated the suit; but if either party, after verdict, had died in vacation, judgment might have been entered that vacation as of the preceding term, and it would have been a good judgment at common law as of the preceding term. And if either party die after a special verdict, and pending the time taken for argument or advising therein, or on motion in arrest of judgment, or for a new trial, judgment may be entered at common law, after his death, as of the term the postea was returnable, or judgment will otherwise be given, nunc pro tunc, that the delay arising from the act of the court may *not turn to the prejudice of the party. (Tidd's Pr. 845, 6.) If courts of law can thus exercise an authority for the purpose of doing substantial justice, it would be surprising indeed if a court of equity could not do the same. *Ut res magis valeat quam pereat.* The court having had jurisdiction of the cause, will retain it to do substantial justice, and to afford the dowress a relief beyond that which she could obtain at law. (*Curtiss v. Curtiss*, 2 Brown's Cas. in Ch. 620.) In this case, a bill of revivor and supplement, filed by the executors of the widow, she dying before decree, for the arrears of dower, was sustained, and decree accordingly.

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But it is contended, that if a decree cannot be entered nunc pro tunc, the suit may be revived by the executor of the complainant. By the 7th section of the act concerning the court of chancery, (1 R. L. 489,) it is provided that "If the complainant shall die pending any suit wherein the cause of action shall not survive, his lawful representatives, and other persons interested by his death, may, on affidavit thereof and on motion in open court, be made complainants in the suit, and be permitted to amend the bill as their interests may require; to which amendment the defendant shall be compellable to answer, and the action shall proceed to issue and trial as in ordinary cases." By virtue of the provisions of this statute, the executor is

tled to a decree for one third of the mesne profits of premises in question, with interest from the time the widow's right accrued, and for costs for the defendant's cautious defence. If to this claim the defendant objects that the husband of the complainant did not die seized; our statute in relation to dower, in R. L. 60, gave the widow, in such case, "dower of the lands according to their value, exclusive of the improvements made since the husband's death," which can be recovered only in her lifetime; and the allowance of the one third of the mesne profits, and costs, would be against the provisions of the act in R. L. 57, sect. 2, which gives the widow damages only in case of a forfeiture, and costs only where damages are recovered; (see *Humphrey v. Phinney*, 2 John. R. 484; *Chester v. Coventry*, 11 John. R. 510;) we answer that an assignment by metes and bounds is but one of several modes of assigning dower, and belongs more particularly to legal actions. In some cases there may be an alternate decree of the property; in others an assignment of one third of the rents and profits; and in others we think the court should decree to the complainant a gross sum, equal in value to the amount of her interest in the premises when her right accrued, to be computed according to the rules of computation on an annuity for lives. (*Swaine v. Perine*, 1 John. Ch. R. 482, 495. *Hale v. James*, 6 John. Ch. R. 476. *Coates v. Cheever*, 1 Cowen's R. 476, 478, 9.) This court has long since decided, that if the widow die before asserting her right to dower, it will, in favor of her personal representatives, decree an account of the rents and profits, since the time her rights accrued. (*Curtiss v. Eames*, 2 Bro. C. C. 620, 1 Fonbl. Eq. 22, 23, note.) It would indeed be hard if a court of equity should hold that a defendant by a protracted defence to a suit for dower, could exonerate himself from accounting for the mesne profits, for the time he unjustly withheld the possession. Again; we say that our act in 1 R. L. 57, sect. 2, is substantially a transcript of the statutes of Merton and

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1831. Gloucester; the former of which it is true gave damages
 Johnson in case of a deforcement; and the latter, costs, in case
 v. there were damages; that the rules in relation to damages
 Thomas. and costs are rules of law, not of equity. They were es-
 tablished to regulate the proceedings upon writs of dower,
 and not upon bills in equity. Chancery did not assume
 jurisdiction in cases of dower until centuries after the pas-
 sage of these acts; and when it did so, it was to relieve
 the dowress from the embarrassments at law, and to give
 her complete relief. (1 Roper's Law of Husband and
 Wife, 445.) A court of equity may not, it is true, where
 the husband does not die seized, award the damages given
 by the statute of Merton. But a court of equity will give
 the dowress mesne profits from the time her right accrued.
 (1 Roper, 435, 448, 9. 1 R. L. 57, section 2.) The widow
 is entitled to be endowed immediately on the death of her
 husband. This right draws after it the right of an account.
 The tenant in possession may also be considered as a trustee
 for the widow. This court has never been governed
 by the rules of the *statutes of Merton and Gloucester.
 That this last position is correct, appears from the deci-
 sions of this court in relation to costs; for the court has
 asserted its right to give costs in its discretion, whether
 the husband died seized or not, and has specified one class
 of cases where it will give costs, to wit, where the widow
 has demanded her dower before suit brought, (as she did
 in this case,) and the defendant has made a groundless de-
 fence, without any qualification as to the husband's dying
 seized or not seized. (*Hazen v. Thurber*, 4 John. Ch. R.
 604. *Swaine v. Perine*, 5 id. 495. *Hale v. James*, 6 id.
 258, 263.) If, then, the jurisdiction of this court was not
 altogether independent of the statutes of Merton and
 Gloucester, how could the court be justified in saying it
 would give costs in dower, as in other cases, as its discre-
 tion dictated? Why would it not be confined in giving
 costs to a case of deforcement? The truth is, that the
 court has the conscience of the defendant in dower in its

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ing, as much so as that of any other defendant; and if he will not voluntarily, it will compel him to do so to the complainant. If, however, it be still insisted that the widow being dead there can be no recovery of the mesne profits, let us see whether the right to costs is extinguished, and what the statute (1 R. L. 60 and 58) and our decisions mean. The statute (1 R. L. 57) says, "if the widow is deforced, the defendant shall yield up the lands to the plaintiff, &c. When she is not deforced, the statute (1 R. L. 60) says she shall recover for her share of "the lands sold by her husband, according to the value of those lands, exclusive of the improvements made since the sale." The decisions of the courts amount to nothing more than that, where the plaintiff is entitled by the statute to damages, she may have costs; and where she shall not have costs where the defendant has retained the lands tout temps prist, and the plaintiff, instead of praying judgment according to the tender, has persisted in going on to judgment, and in the end obtained only that the defendant offered to assign her; or rather, the decisions are altogether silent about costs in such case; either in these decisions, nor in the statute, is it decided that the dowress shall not be entitled to costs where the husband did not die seized, but only that she may be entitled to costs where he did die seized. It is not impossible that the phraseology, "provided that dower of lands sold by the husband shall be according to the value of the lands, exclusive of the improvements made since the sale," was intended for no other purpose than to fix the amount of the specific value of the land to be recovered as dower when the husband did not die seized, namely, that it should be the value of the land at the time of alienation, and not the value at the time of the seizure; and it clearly never was intended, by the use of this language, that there should be no recovery of the mesne profits according to that value, and no costs for an unscientific defence to prevent such recovery. If the

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1831. right of the executor be questioned in this cause, on the
 Johnson ground that the interest of the dowress savors not of the
 v. personalty, but of the realty, it is answered that the widow
 Thomas has no estate until assignment; for the law casts the free-
 hold upon the heir, on the death of the ancestor, and un-
 til dower is legally assigned it is a right resting in action
 only. (1 Cruise, 159. 2 Gilbert on Tenures, 26. *Jackson*
v. Aspell, 20 John. R. 411, 413. *Jackson v. Van Der*
heyden, 17 John. R. 168.) If we are right in our opinions
 as to the powers of a court of equity, whatever may be
 the correctness of those with regard to courts of law, the
 executor is in conscience entitled to mesne profits, as the
 widow would have been entitled to them had she lived.
 There is, it is believed, no precedent which forbids the
 granting such relief in England, and certainly there is
 none in this country; nor can any reason be assigned why
 the widow did not become possessed of the mesne profits
 in her life time, but the injustice of the defendant, or the
 delay of the court; and if there ever be a case in which
 a court of equity should discard the technicalities of the
 law, and do substantial justice between the parties, it is
 in a case of dower, a claim which even the law regards
 favorably, as it is the support and solace of the widow in
 the winter of her life.

[*383] *S. Beardsley*, for the defendant, contended that no pre-
 cedent could be found for this motion; that a decree could
 not be entered nunc pro tunc, where a different chancellor
 *presided from the one before whom the cause was argued;
 that damages could not be given to the widow where the
 husband did not die seized, and if she was not entitled to
 damages, that she could not recover costs; and that where
 the husband did not die seized, the widow could not, either
 at law or in equity, recover mesne profits. He cited 2
Atk. R. 141; *Dormer v. Fortesque*, 3 id. 132, and note;
Embree v. Ellis, 2 John. R. 119; *Humphrey v. Phinney*,
 2 id. 484; *Mundy v. Mundy*, 2 Ves. jun. 125.

THE CHANCELLOR. I think it would be carrying the principle too far to permit this cause to be argued before present chancellor, without revival, and then to enter decree nunc pro tunc, as at the time when it was argued before his predecessor. If the executor has the right to revive, such a course is unnecessary; and if the whole grounds of the suit have been removed by the death of the complainant, it would be against the settled practice of the court to hear an argument of the original merits of the cause, merely for the purpose of determining a question of costs between the parties. (12 John. R. 500. 1 Simon. 39. 3 John. Ch. R. 317. Mad. & Geldart's R. 365.) Where the dowress brings her action at law, if she dies before her right is established, her representatives have no remedy for costs, or for the mesne profits of the land since her right accrued. By the statute of Mercur (20 Hen. 3, c. 1; R. L. of 1813, p. 57, § 2,) she could recover damages, in cases where the husband died intestate. And even in cases coming within that statute, if the husband had not made a formal demand of dower, before suit brought, the defendant at law might plead that he had always been ready to assign the dower, and thus excuse himself from damages and costs. But in chancery the rule is different. There, if the husband died seized, the widow may recover against the heir, or devisee, her share of the rents and profits from the time the right accrued, though no demand was made previous to the commencement of the suit. (*Mundy v. Mundy*, 2 Ves. jun. *Russell v. Austin*, 1 Paige's R. 192. *Hazen v. Warner*, 4 John. Ch. R. 604.) In such cases the death of the dowress, pending the suit in this court, does not deprive her personal representatives of the arrears of principal; but they may revive, for the purpose of having judgment given for the principal to such arrears determined by the decree of the court. And the question of costs will be decided upon the same principles which would have governed the decision of this court previous to her death.

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It is however insisted on the part of the defendant this suit, that as the husband did not die seized, the w. could not have recovered any arrears of dower, if living. If he is right in that position, the petitioner cannot revive merely to settle the question of costs. It is evident that under the statute which was in force at the death of the complainant, no damages for arrears of dower could have been recovered at law; and the question is whether this court, in a direct proceeding here for the dower, will give to the complainant a more extensive remedy. At common law, and before the statute of Merton, the widow could in no case recover damages in an action of dower at law; and this court had not at that time assumed jurisdiction of suits for dower, except in those cases where the tenant interposed some equitable defence, or proceeding to prevent her recovery in the common law courts. Since the passing of that statute, courts of law have permitted the tenant to interpose a technical defence, to the claim for damages and costs, that he has always been ready to assign dower, but that the plaintiff has never demanded it of him. Even at law, however, the plaintiff was entitled to recover the value of the use of one third of the premises, from the death of the husband, if this plea was not interposed, or if a demand was proved. (*Dobson v. Dobson*, Cases Temp. Hardw. 19.) In this court, under the equity of that statute, the heir or devisee who has actually received the widow's share of the rents and profits of the premises, has been considered as holding the same in trust for her, although a formal demand of dower had not been made. Roper seems to take it for granted, that the court of chancery would go still further, and give to the wife a remedy for arrears of dower in cases not embraced by the statute of Merton. (1 Roper's Husband and Wife, 449.) He admits however that the case of *Delver v. Hunter*, in the court of exchequer, in 1719, (Bunb. Rep. 57,) is against him on this point. And he cites no case in which a court of equity has given t

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plainant arrears of dower, on a direct proceeding purpose, where the husband aliened the premises his death. In the absence of all authority, I do k myself justified, under the circumstances of this decide that the executor has a right to revive, and er the arrears of dower, deducting therefrom his on of the mortgage, which is a previous incum- on the premises. The revised statutes have given idow a better remedy for her dower, and a more d right to damages for the detention thereof, than ich existed at the commencement of this suit. annot therefore be any reason for extending the e principles heretofore established, with a view e cases.[1]

etition is dismissed in this case, but without costs.

ow was not entitled to damages for the detention of her dower, mon law. Statute of Merton, 20 Hen. 3, ch. 1, re-enacted in gave damages for the detention of dower recovered by the nihil habet, in lands of which the husband died seized. Equity e allows damages. But damages are not recoverable, either in at law, for the detention of dower in lands aliened by the his lifetime. *Kendall v. Honey*, 5 Monroe, 283. Where, from of the demandant, it is impossible to assign dower, damages rendered for its detention. *Rowe v. Johnson*, Maine Rep. by 146. In dower, the widow is entitled to damages for the de- against a purchaser of the husband's title after his death, only late of the purchase, and not from the death of the husband. *ennant*, 2 Harr. Rep. 336. Dower in such case is to be as- ording to the value of the land at the time of the alienation, garding improvements subsequently made by the alienee. Ib. it continues seized of his real estate sold under a judgment and until the time for redemption expires; and where he dies be- ne for redemption expires, his widow will be entitled to arrears *Russell v. Austin*, 1 Paige, 192. Arrears of dower against the of the premises in which dower is claimed, can only be recovered ime of the purchase. Ib. Where there is an outstanding upon the premises, the arrears of dower will be computed by from one third of the rents and profits over and above the epairs, taxes, &c., one third of the interest on the amount due tgage at the time the defendant acquired title to the premises. ges for arrears of dower can be recovered ag uinst a purchaser

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1881. only from the time his title accrued. *Newbold v. Ridgeway*, 1 Harrington's Rep. 55. Widow is not entitled to damages for detention of dower lands, unless the husband died seized. *Whitehead v. Bellamy*, 2 Haywood, 240. On the assignment of dower, the widow becomes entitled to the back rents. *Wood v. Lee*, 5 Monroe, 57. Widow is entitled to the rents of the whole manor farm of her husband until the assignment of dower. *Graham's heirs v. Graham*, 6 Monroe, 562. Widow not entitled to rents or interest on dower; nor to damages, unless her husband died seized. *Golden v. Maupin*, 2 J. J. Marsh. 240. Upon a bill in equity by a widow against an alienee of the husband, for dower of lands sold, she is not entitled to an account of profits from the death of the husband, but only from the date of the subpoena in the cause. Otherwise, upon a bill against the heir. *Tod v. Baylor*, 4 Leigh, 498. Where a wife joins her husband in a mortgage, she is entitled to dower in the equity of redemption, and also to an account of the mesne profits from the death of her husband, who is to be considered as having died seized of the equity of redemption, or of the real estate subject to the mortgage. *Bucius v. Perine*, 5 John. Ch. Rep. 492. See Waterman's Am. Ch. Dig. tit. Down.

COLVIN v. COLVIN.

Where, upon a bill filed by the husband for a divorce *a vinculo matrimonii*, a decree dissolving the marriage contract was made, and after enrolment both parties joined in a petition to the court, requesting that the enrolment of the decree might be opened and vacated, and the decree reversed, the court granted an order according to the prayer of the petition, and dismissed the complainant's bill; but without prejudice to the rights which third persons might have acquired under the decree.

THE complainant filed his bill in this cause to obtain a divorce. The defendant put in her answer thereto, and a reference was made to a master to take proofs of the adultery charged in the complainant's bill. On the coming in of the master's report the usual decree was made dissolving the marriage contract between the parties; and prohibiting the defendant from marrying again during the life of the complainant. After this decree had been regularly enrolled, both parties joined in a petition to the court, requesting that the enrolment of the decree might

d vacated ; that the decree might be reversed ; parties restored to *all the rights and privileges they had previously enjoyed ; and that the bill and all other papers filed in the cause be taken from the files and destroyed.

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CHANCELLOR. The decree in this cause having been regularly entered upon the admissions confessed in answer of the defendant, and upon proofs *facie* established the facts charged in the bill. It cannot make any order which will affect the rights of third persons, acquired under the decree. The complainant states, on oath, that he is now satisfied the defendant was not guilty of the adultery charged in the bill. If the defendant has contracted any other marriage, either of the parties have sold or disposed of property, where the other ought to have joined in the bill, and the marriage had continued, the rights acquired by the other party, or purchaser, must be protected. It would be improper for the court to order the proceedings taken off the files and destroyed. But I see no objection to granting the other part of the prayer in the bill. The right to a dissolution of the marriage is one which, under certain circumstances, may be granted on by the injured party, or may be waived, and is not against public policy, so far from requiring to be enforced, is in favor of condonation or forgiveness in all cases. In England, even in cases of adultery, the marriage is not dissolved by the decree of the ecclesiastical court. The parties are separated from bed, board, and marital cohabitation, and shall be reconciled to each other ; and permitted to marry in the lifetime of the other. (*Marriage and Divorce, 182.*) It there becomes the duty of the court to alter the sentence so as to permit the parties to resume their connubial rights, upon a proper case being made to the court and due proof of their reconcilia-

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tion, unless the marriage has been actually dissolved by act of parliament. Here the marriage is in fact dissolved; and so long as the decree remains in force, one of the parties is prohibited from marrying again even to the former husband or wife. If the parties should cohabit, without applying to the court to open the decree, all the issue of such illegal intercourse *would be illegitimate. When so many learned divines, from the almost inspired author of "The Pastor of Herinas"^(a) down to the present day, had either denied or doubted the right of the innocent party to re-marry after a divorce for adultery, this court ought not to refuse to open the decree, in any case, upon sufficient evidence of forgiveness, and where no third person can be injured thereby. But more especially is it proper in this case where the complainant states on oath that since the making of the decree he has become satisfied, by proofs and facts which have come to his knowledge, that the defendant was not guilty of the crime of adultery.

An order must therefore be entered, opening the enrolment, and vacating the decree entered in this cause, and directing the complainant's bill to be dismissed; but without prejudice to the rights which any third person may have acquired under the decree. And to prevent any one who has no interest in this question from disturbing the peace of this family, the register is directed to seal up the pleadings and proofs, together with the master's report; and not to suffer them to be copied or inspected, except by the special permission of the court.

(a) See Dr. Ireland's *Nuptia Sacra*.

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Striker
v.
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G. II. AND E. STRIKER v. MOTT AND OTHERS.

A party who has merely a future contingent interest in an undivided share of real estate cannot sustain a suit for a partition of the property.

A mere reversioner, without the concurrence of any of the owners of the present interest in the premises, has no right to file a bill for partition.

But a reversioner is a necessary party, where a bill is filed by a person who is owner of an undivided share of the reversion as well as of an undivided share of the present interest in the property.

The reversioner is also a necessary party, where the suit is brought by the owner of an undivided share of the premises for life, or of any other particular estate in the same, and some of the other parties own the residue of the premises in fee.

THIS was an appeal from the decision of the vice chancellor of the first circuit. The bill was filed for the partition and sale of a house and lot in the city of New York, which formerly belonged to the grandfather of Mrs. Mott and of the *complainants; and also for an account of the rents and profits of their grandfather's estate. The principal question in the cause arose upon the construction of the will of J. Hopper, the grandfather. He devised his property to his three grandchildren and to their heirs forever, to be disposed of by his executors and the survivor of them, or the administrators of such survivor, as follows: "The said real estate shall not at any time hereafter be sold or alienated, but my said executors and the survivor of them, or the executor or administrator of such survivor, shall from time to time lease or rent the same on such terms and for such rent as they may deem most advantageous to my said heirs; and the rents, issues, and profits thereof shall be annually paid by my said executors and the survivor of them, or the executors or administrators of such survivor, to my heirs, in equal proportions. And in case my said heirs and devisees shall die without lawful issue, then, and in such case, my will is that the share of the one so dying shall be and

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enure to the sole use, benefit, and behoof of my said grand children and the survivor of them and the heirs of such survivor forever."

The vice chancellor decided that the complainants were not entitled to a partition, and dismissed the bill so far as it sought a partition of the premises; but directed an account of the rents and profits received by the executor and trustees under the will. From this decision the complainants appealed to the chancellor.

J. R. Hedley, for the complainants.

W. Slosson, for the defendants.

[*389] THE CHANCELLOR. I think the vice chancellor decided correctly in refusing partition in this case. The executors, under the will, and such person as should be the personal representative of the survivor, if both executors died during the continuance of the trust, took, by implication of law, an estate in trust during the lives of the three grand children. And the complainants and *Mrs. Mott* are each entitled to a contingent or conditional fee in one third of the remainder of the estate, provided they have issue living at their deaths; with cross remainder if either dies without issue. The complainants are not entitled to a partition of the present interest in the *premises, as that is vested in the executors in trust to pay one third of the rents and profits to each of the grand children. And they cannot claim a division of their future estate in the premises, as it is not yet ascertained that it will belong to them at the determination of the particular estate vested in the executors.

Besides, I am not aware of any case in which a party who had a mere reversionary interest in an estate has been permitted to apply for a partition, without the concurrence of the owners of the present interest. A reversioner is sometimes a necessary party to a bill in partition;

where the owner of a present interest in an un-
part of the premises has also an interest in an
ed part of the reversion. In such cases it is
for such owner of the present interest to make the
f the residue of the reversion, as well as those who
rested in the residue of the particular estate, parties
nit ; so that an entire share may be set off to the
nant in severalty. It is also necessary to make a
ner a party to a bill filed by an owner of a par-
state, when some of the other parties interested in
due of the premises are the owners of a present
thereof in fee. But I can see no possible benefit
ne tenant in common of a reversion, even if he
absolute estate therein, can derive from a partition
ture interest in the property. He ought not there-
be permitted to file a bill merely for the sake of
costs, or to compel a sale of the property of his
it. The sale, where it is permitted, is merely inci-
o the partition ; and is resorted to for the purpose
enting a sacrifice of the property by a division.
reversioner can derive no benefit from an actual
i of the premises during the continuance of the par-
state, he ought not to be permitted to commence
or the mere purpose of compelling a sale of the
r during that period ; or to subject other parties
prematurely and unnecessarily.
decree of the vice chancellor must therefore be
, with costs ; and the cause must be remitted to
t such further proceedings may be had therein as
necessary.

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Livingston

v.

Peru Iron Co.

*LIVINGSTON v. THE PERU IRON COMPANY AND OTHERS.

Where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purpose of a sheep pasture, when he knew there was a valuable mine on the lot, of the existence of which the vendor was ignorant, *held*, that this was such a fraud as would avoid the purchase.

Although a simple suppression of the truth by one of the parties to a contract may not be sufficient to authorize a court to set it aside, yet if any thing is said or done to mislead or deceive the other party to the same, the court will grant relief against the contract.

The court of chancery will not compel a specific performance of a contract if the complainant intentionally concealed a material fact from the defendant, the disclosure of which would have prevented the making of the contract.

Where the vendor is dead, all his heirs at law should be parties to a bill to set aside the sale on the ground of fraud upon the part of the vendee.

If the vendor makes a subsequent conveyance, while the fraudulent vendee is in actual possession claiming the land under his prior purchase, the subsequent conveyance is inoperative; and a suit to set aside the first sale must be brought in the name of the vendor, or of his legal representatives if he is dead.

April 5th. THE bill in this cause was filed by the son and grantee of John Livingston deceased, to set aside the conveyance of a lot of land, on the ground of fraud. The bill stated among other things, that Palmer, one of the defendants, applied to J. Livingston to purchase the land in question, which was then wild and uncultivated, and that he falsely represented to Livingston that the same was of little or no value except for a sheep pasture, for which purpose he wanted the lot; whereas in point of fact he had previously discovered a valuable ore bed on the premises; which fact he fraudulently concealed from Livingston. The bill also stated that in consequence of this representation and fraudulent concealment, Livingston was induced to sell 164 acres of land to Palmer at \$2 per acre; when the ore bed alone was worth \$70,000.

The Peru Iron Company demurred to the bill for want

f equity. They also showed for special grounds of ^{1931.} Livingston
 demurrer, that it appeared by the bill that the complain- ^{V.}
 ant was not the sole heir at law of his father; that the ^{Pera Iron Co}
 conveyance to him, in January, 1820, while the defendants
 were in possession claiming the land as their own under
 the previous conveyance, was void by the statute against
 buying pretended titles; and that *all the heirs at law
 should have been made parties to the suit. [*391]

J. L. Mason, for the defendants. All the heirs at law
 of John Livingston should have been made parties to the
 bill. The mere concealment by Palmer, one of the de-
 mandants, of the fact of his discovery of the ore bed on the
 premises purchased from John Livingston is not such a
 fraud as will authorize a court of equity to set aside the
 sale. (*Whelan v. Whelan*, 3 Cowen's R. 560. Chitty on
 Contr. 223. Sugd. Vend. 1. *The Dos Hermanos*, Green
 Claimant, 2 Wheaton's R. 78. *Fox v. Mackreth*, 2 Brown's
 Cas. in Ch. 420. *Lessee of Eichelberger v. Barnitz*, 1
 Bates' R. 307. 2 Kent's Com. 377, 380, 381. *Dale v.*
Roosevelt, 5 John. Ch. R. 174. *Vernon v. Keys*, 12 Fast's
 R. 632. Sugd. Vend. 3, and note.) A false affirmation
 as to value is not a ground of setting aside a contract for
 the sale of land. The complainant is not entitled to a
 decree upon the case made by his bill. (4 Kent's Com.
 438.)

J. Van Orden, for the complainant. The conveyance
 to Palmer was void. The fraud committed by him is a
 sufficient ground to authorize the court to set it aside.
 (*Monell v. Colden*, 13 John. R. 395. Sugden's Law of
 Vend. 193, 246, 289. 1 Fonbl. Eq. 70, 71.) The con-
 veyance to the complainant by John Livingston was valid.
 If it cannot otherwise operate, it will be considered as a
 testamentary disposition, which an adverse possession can-
 not defeat. (*Jackson v. Sebring*, 16 John. R. 515.)

THE CHANCELLOR. Upon the merits of this case the

1881. demurrer cannot be sustained. I am not aware of a case in our own courts, or in England, where the suppression, by the buyer, of a fact which materially enhanced the value of the property, has been deemed sufficient to set aside the sale, on the ground of fraud. The rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement. In such a case this court will not enforce a specific performance of the contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement; but he will be left to his remedy at law. It has even been questioned by many whether the suppression of a material fact by the one party, of which fact he knew the other party to be ignorant, was not of itself sufficient to avoid the contract on the ground of fraud. Thus in *Perkins v. McGavock*, (Cook's Rep. 417,) the court of errors and appeals in Tennessee say, it is a sound principle of equity that each party to a contract is bound to disclose to the other all he knows respecting the subject matter materially affecting a correct view of it, unless common observation would have furnished the information. They also say that the neglect to disclose facts within the knowledge of one party, and not of the other, would in equity be considered a concealment which is both immoral and unjust. Although our courts have not gone that length, yet, even in this state, very slight circumstances, in addition to the intentional concealment of a fact, have been considered sufficient to constitute a fraud upon the other party. Thus in *Wendell v. Fosdick & Davis*, (13 John. R. 325,) where the defendants had taken a deed of land which they afterwards ascertained had no actual existence, and after this they sold and assigned their interest under that deed to the plaintiff, without disclosing to him that fact, he was permitted to recover against them for the fraud. So also in *Monell & Weller v. Colden*, (id. 395,) where the vendor

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of a water lot, knowing that the purchasers wanted to buy the lot for the purpose of obtaining the privilege of a wharf, represented to them that the owners of land bounded on the water had a right by law to apply to the commissioners of the land office for a grant of the privilege to build a wharf adjacent to the land, whereas he in fact knew that the lands under the water had been previously granted, the purchasers were allowed to recover for the fraud. And in a recent case before Lord Eldon, he adverts to the general principle that parties dealing for an estate have a right to put each other at arm's length; and that if the purchaser knows there is a mine upon the estate, and the vendor makes no inquiry, the former is not bound to give him information thereof. But he says, "Very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." (*Turner v. Harvey*, Jacob's R. 178.) And certainly if the purchaser does any act, or makes any declaration, with the intention of misleading the seller and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of a fraudulent deception.

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From the statement in the bill this case appears to be one of that description. The defendant Palmer had discovered a valuable mine on the lands of Livingston, which were then wild and uncultivated and lay remote from the residence of the latter. Knowing that he could not obtain the land if he discovered the fact of the existence of the mine, he does not content himself with making a bargain, in the language of Lord Eldon, at arm's length; but he falsely and fraudulently represents the land as being of no value except for a sheep pasture, and states that he wants it for that purpose. By this deception the vendor is thrown completely off his guard, and he contracts to sell the land at the usual rate or price of rough broken

1831. land in that region, instead of directing his agent, ne-
 Livingston the premises, to inquire and ascertain its true value.
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*394] But I think there is an insuperable objection to the
 complainant's recovering upon his bill in its present shape.
 Although the conveyance of the land was obtained by a
 fraudulent misrepresentation, it was not void. It was only
 voidable, at the election of the vendor. And the defendants
 or some of them were in the actual possession of the
 premises, claiming title to the same under their deed, at
 the time of the conveyance to the complainant. The legal
 title to this property could not pass to the complainant,
 under that conveyance, while it was thus held adversely.
 If John Livingston was still living he would be a necessary
 party to a bill to rescind the sale on the ground of
 fraud. Since his death, all his heirs at law, or the devisees
 of this particular part of his estate, are necessary parties.
 I lay out of question what was said on the argument
 as to this conveyance to the complainant being in
 the nature of a testamentary disposition of his property,
 to carry into effect a previous arrangement. The deed
 of January, 1820, is not set up in the bill as a devise of the
 estate, but as an absolute grant; neither is it stated to have
 been executed in due form of law as a will of real estate.

The demurrer must therefore be allowed, with liberty
 to the complainant to amend his bill by making all the
 heirs at law, or the devisees of John Livingston, parties
 thereto, on payment of costs. And if he does not amend
 within sixty days, the bill must be dismissed, with costs
 to the defendants.

It may be proper however to suggest that if the fact is,
 as stated by the defendant's counsel, that John Livingston
 devised no part of this land to the complainant, but that
 he actually made a will by which it was devised to other
 persons, under the general description of all the residue
 of his estate, no amendment can help the complainant. (a)

(a) See *The King of Spain v. Moichade*, 4 Russ. R. 225; *Cuff v. Platell*,
 id. 242; *Makepeace v. Haythorne*, id. 245.

that case it will be necessary to dismiss the bill in this
it, and to bring a new action in the names of those to
nom the legal title passed on the death of John Living-
n, if they shall be advised to proceed further in this
atter.

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Jenkins
v.
Wilde.

S. & J. F. JENKINS v. WILDE AND OTHERS.

master has no authority to allow an injunction, to stay proceedings at
law after judgment, except upon the terms prescribed by the statute;
and if the injunction has been issued without depositing the amount of
the judgment, and giving the bond as required by the statute, it will be
set aside for irregularity.

the suit at law is not at issue, the master should direct the provision
directed by the 83d rule, to be inserted in the injunction, unless the in-
junction is founded on a mere bill of discovery.

issue has been joined in the suit at law, the master should take the bond
and security, as directed by the statute in such cases, and direct that it
be filed with the proper officer before the issuing of the injunction.

here there has been a verdict, the master should ascertain and direct the
amount to be deposited; and if a judgment has been obtained, he should
not only direct the amount of the judgment to be deposited, but should
also take a bond and security to answer the damages and costs, in case
the injunction should be dissolved.

one but the court, after verdict or judgment, can dispense with the actual
deposit of the debt and costs, before the issuing of the injunction.

the register or clerk discovers that the statute relative to injunctions has
not been complied with, by the injunction master, he should not issue
the process without the special directions of the court.

*In this case the master allowed an injunction to re-
tain proceedings in a suit at law, after judgment. The
certificate on which the order for the injunction was ob-
tained did not state that a judgment had been rendered.
The injunction was therefore issued without depositing
the amount of the judgment and without filing a bond
with sureties, as required by the statute. (2 R. S. 189,
141.)

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THE CHANCELLOR ordered the injunction to be set aside for irregularity. He said the statute was imperative; and that the master had no authority in such a case to allow an injunction to stay the proceedings on a judgment, except upon the terms prescribed by the statute. That it was the duty of the master to ascertain from an examination of the bill, the situation of the suit at law; and if no issue had been joined, he should, in his certificate, direct a provision to be inserted in the injunction according to the thirty-third rule, permitting the party to proceed to judgment; unless it was a bill of discovery merely. That where the suit at law was at issue, it was the master's duty to take from the complainant a bond and security, as required by the 139th section of the statute; and to specify in his certificate that such bond was to be filed with the proper officer before the issuing of an injunction. That if a verdict had been obtained in a personal action, the master should ascertain the amount of the debt or damages recovered by the verdict, and of the probable costs in the suit, and should specify in a certificate the sum to be deposited. If the verdict was in a real or mixed action, he should take from the complainant a bond and security, as required by the 144th section. And if a judgment had been rendered in the cause, the master should direct the full amount of the judgment and costs to be deposited; and should also take a bond and security for the payment of the plaintiff's damages, by reason of the injunction, and such costs as might be awarded to him in this court. That no one but the chancellor or vice chancellor, before whom the bill was filed, had a right to take a bond and security in lieu of the actual deposit of the money, after verdict or judgment. And that even the court could not dispense with the security in any of the cases mentioned in the 5th article, (2 R. S. 188,) unless there had been actual fraud in obtaining the verdict or judgment. The chancellor further stated, that in every case where an injunction was obtained contrary to the

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ite, or to the thirty-third rule of the court, the defend-
 might apply and have it set aside for irregularity, with
 1. And that if the register or clerk, with whom the
 was filed, discovered that the master had allowed an
 action contrary to the provisons of the statute or to
 standing rules, he might decline to enter an order for
 injunction on the master's certificate, and refer the
 action to the court.

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Colton

v.

Ross.

COLTON AND OTHERS v. ROSS AND OTHERS.

I may be framed with a double aspect, where it is doubtful what re-
 the complainant is entitled to on the facts of his case.
 ch case the relief prayed for may be in the alternative; but it must
 consistent with the case made by the bill.
 e the case made by the bill entitles the complainant to one of two
 ds of relief, but not to both, the prayer should be in the disjunctive.
 it be doubtful whether the facts of the case entitle him to the specific
 f prayed for, or to relief in some other form, his prayer concluding
 general relief should be in the disjunctive.
 h case, although the complainant should not be entitled to the relief
 ifically prayed for, he may, under the general prayer, obtain any
 r specific relief consistent with the case made by the bill.
 here the complainant prays for particular relief, and for other relief
 addition thereto, he can have no relief inconsistent with such par-
 lar relief, although it should be founded upon the bill.
 ourt of chancery has no original jurisdiction to try the validity of
 s of personal estate.
 isdiction of the court exists only in case of an appeal from the de-
 n of the surrogate.
 no appeal is made to the court of chancery, the probate of the will
 re the surrogate is final and conclusive, as to the personal estate.
 ourt of chancery has no jurisdiction to set aside a will of real estate,
 the ground of the incompetency of the testator; and wherever the
 plainant has perfect remedy at law, if the defendant raises the ob-
 on by demurter to the bill, or insists upon it in his answer, the court
 refuse to sustain the suit.
 ourt, however, frequently decides upon the validity of a will of real
 te, where the question arises collaterally; but in those cases, if the
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1831. heir insists upon the invalidity of the will in his answer, an issue will be
Colton awarded to try the question at law.
v.
Ross.

April 19th. *The bill in this cause was filed to set aside the will of William Ross deceased. It appeared by the bill that the will disposed of both real and personal estate, and that the executor, in 1822, duly proved the will before the surrogate of New York, and obtained letters testamentary thereon. The complainants alleged that the testator at the time of making the will was of unsound mind, and wholly incapable of making a valid will. And they, among other things, prayed that the will might be declared void, and that they might be let in to their share of the estate; and that if it should appear to the court the will was valid, that the executor might be removed from his trust for mismanagement; and for further relief, &c. The executor demurred to the bill, so far as it sought to set aside the will as to the personal estate, on the ground that the sentence of the surrogate in favor of the same was conclusive, and that this court could not review his decision on that question, except upon an appeal; and, so far as it sought to impeach the will as a devise of the real estate, upon the ground that the complainants' remedy was perfect at law.

R. Sedgwick and E. N. Mead, for the complainants.

P. A. Jay and J. Greenwood, for the executor.

THE CHANCELLOR. There is no doubt of the right of a complainant, in certain cases, to frame his bill with a double aspect, where it is doubtful what relief he may be entitled to on the facts. In such a case the prayer for relief may be in the alternative; but the relief must always be consistent with the case made by the bill. Here the complainants claim as heirs at law and next of kin to the testator, under a positive allegation that no valid will was ever made. That part of the prayer which is for

cial relief, if the court should be satisfied there was a d will, is therefore wholly inconsistent with the case le by the bill. Another substantial objection is that prayer for relief in this case is not in the alternative; the last part of the relief prayed for is in addition to prayer that the will may be declared void. Where case made by the bill may entitle the complainant to kind of relief or another, but not to both, the prayer uld be in the *disjunctive. So, if the complainant is doubt whether the facts of his case entitle him to a rific relief prayed for, or to relief in some other form, prayer, concluding for general relief, should be in the unctive. And in such a case, although he is not end to the relief specifically prayed for, he may, under general prayer, obtain any other specific relief, proed it is consistent with the case made by the bill. (Per mpson, J., 1 John. R. 559. 13 Ves. jun. 119. 1 n. Ch. R. 117. 2 Young & Jervis, 33. 2 Peters' R. .) But if a complainant prays for particular relief, /other relief in addition thereto, he can have no relief nsistent with such particular relief, although founded n the bill.

o far as respects the personal estate, the probate of the , before the surrogate, is final and conclusive; and this rt has no jurisdiction to try its validity, except upon eal from that decision. In *Lynn v. Beaver*, (Turner uss. R. 67,) Lord Eldon says: "With respect to wills ersonalty, after probate has been granted by the ec- iastical court, this court is bound by the judgment, has no jurisdiction to try whether the will is complete ot." (See also 2 Rob. on Wills, 50. 1 Mad. R. 1. her v. *Morse*, 2 Vern. R. 8.) This court frequently des upon the validity of a will of real estate, when the tion comes before it collaterally; but if the heir in- upon the invalidity of the will, in his answer, an is awarded to try the question at law. It is how- well settled that the heir cannot file a bill in this

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1831. court to set aside a will, on the ground of the incompetency of the testator, if the defendant chooses to avail himself of the objection in the proper stage of the suit. In *Kerish v. Bransby*, (3 Bro. P. C. 358,) Lord Macclesfield set aside a will on the ground that it was fraudulently obtained. On appeal to the house of lords, the objection was taken that the question as to the validity of the will was only triable at law; and his decree was reversed. The case of *Jones v. Jones*, in the exchequer, (7 Price's R. 663,) was very similar to that now under consideration. The heir at law filed his bill to establish his title against a will alleged to be void for fraud and collusion, and for various other reasons. The bill, as in this case, charged that the defendant had possessed himself of the title deeds, &c. It prayed for a discovery and account, and for an injunction and a receiver; and that the pretended will might be set aside and declared void. The defendant demurred for want of equity, and insisted that the party could not come into a court of equity to try the validity of the will. The court sustained the objection, and allowed the demurrer. They say the real question is whether the will is valid or not; and that is a question which we cannot determine: some of the old cases imply a power in courts of equity to interfere in cases of wills procured by fraud; but it is now well settled that they cannot. The same question, and apparently in relation to the same will, and by the same complainant, was brought before Sir William Grant, the master of the rolls, in 1817, (3 Meriv. 161;) before Sir J. Leach, vice chancellor, in 1818, (3 Mad. R. 1;) and subsequently before Lord Eldon, on appeal, in 1822; and at each time it received a similar decision. In *Jones v. Frost*, (Jacob's R. 466,) the lord chancellor says, the bill seeks to give the court jurisdiction to try the validity of a will of real estate, as to which it has no jurisdiction, and to try the validity of a will of personal estate, as to which it also has no jurisdiction.

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se recent decisions in the English courts of equity act, they are decisive of the question in this cause. have not been able to find any case in which a equity has assumed jurisdiction to set aside a the ground of the testator's incompetency, where tion to the jurisdiction was taken in due season. *nonsend v. Sice*, before this court, (2d March, ie parties claimed under different wills; and after l taken proofs in the cause, issues were awarded he validity of the wills. But those issues were without examining the question of jurisdiction, as not raised. On the application for a re-hear- a new trial, an opinion was intimated that the of the will was probably conclusive upon the par-) the personal estate; but as the defendants would led to the benefit of their objection at the hear- court refused to interfere at that time. If the it does not object to the jurisdiction, this *court doubtedly award an issue *devisavit ve non*; and, e finding of the jury, may pronounce against the of a will of real estate. But if the complainant rfect remedy at law, and the defendant raises that a by demurrer to the bill, or insists on it, by way tion to the jurisdiction of the court, in his answer, plainant should be left to seek his redress in the late tribunal. (2 M'Cord's Ch. R. 71.) emurrer must be allowed, and the bill dismissed ts.[1]

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objection to the jurisdiction of the court, that the complainant quate remedy at law, should be made by plea, or demurrer, or distinctly stated in the answer of the defendant. *Wiswall v* ige, 313. The court of chancery will not refuse to take juria suit, although the complainant has a perfect remedy at law, ties agree to submit the case to the decision of the court, withon as to jurisdiction. *Bank of Utica v. City of Utica*, 4 Paige, rib in equity cannot be maintained against the sureties on an tion bond. The remedy is at law. *Teague v. Denby*, 2 M'Cord's 09. A tenant complaining of distress made for more rent than

1831. was in arrear and due, and not having resorted to an action of replevin for redress, nor showing any reason for failure to resort to his remedy at law is not entitled to relief in equity. *Mayo v. Winfree*, 2 Leigh, 370. An objection to jurisdiction for want of parties, of equity in the bill, or of there being a remedy at law, need not be made by demurrer, plea, or in the answer; it may be made at the hearing or on appeal. *Baker v. Biddle*, Baldwin's Rep. 411. After an answer to a bill in equity, and a general replication has been filed, and evidence taken, and the cause has come on to hearing, it is too late to object to the jurisdiction of the court on the ground that the plaintiff has an adequate remedy at law, provided it is competent to the court to grant relief, and it has jurisdiction of the subject matter. *Clark v. Flint*, 22 Pickering, 231. Of concurrent jurisdiction of the courts of equity against co-sureties with courts of law. *Wood v. Leland*, 22 Pickering, 503. On a bill in equity to compel the delivery of a deed deposited in the hands of the defendant by the plaintiff and another person, who respectively claimed a title to the same, and which the plaintiff demanded, but the defendant refused to deliver up until this court should direct him what to do therewith, it was held that this court had equity jurisdiction in the case under the revised statutes, ch. 81, s. 8, and that the plaintiff was not obliged to resort to a writ of replevin. *Mills v. Gore*, 20 Pickering, 28. A party will not be allowed to litigate a question in a court of equity, and after failing to establish his claim, again to litigate it in a court of law. 1b. The court has no jurisdiction over suits in equity for the redemption or foreclosure of equitable mortgages. *Eaton v. Green*, 22 Pickering, 526. If the guardian of a spendthrift, having assets, refuse to pay a debt due from his ward, the creditor has a plain and adequate remedy at law, by an action on the guardianship bond. A bill in equity, therefore, for the recovery of the debt, cannot be sustained. *Conant v. Kendall*, 21 Pickering, 36. Courts of equity never interpose where legal questions only are involved, except where the remedy at law is not clear, certain or adequate; or to prevent a multiplicity of actions where the subject matter of contest is held by one individual in opposition to a number of persons who controvert his right, and who hold separate and distinct interests depending upon a common source, or with a view to put an end to vexatious and ruinous litigation where the party has satisfactorily established his right at law. *Nevitt v. Gilla-
pie*, 1 Howard, 108. Where the plaintiff and defendant each had an undivided interest in the subject matter of the suit, the extent of which was not ascertained, being contained in an entire property, and the court being called upon to protect the interest of each party, it was held a proper subject for equity jurisdiction. *Cable v. Martin*, 2 Howard, 552. Where the remedy is more full and complete in equity than at law, a court of equity will entertain jurisdiction. *Barne's adm'r. v. Lloyd*, 2 Howard, 534. This court has jurisdiction in chancery of a complaint by the grantees of an exclusive right of building and maintaining a bridge, set

ling forth that others are attempting to infringe their rights, by the erection of another bridge to their prejudice; and if the right is clear, may, by injunction, restrain the party from proceeding to erect such bridge. *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. Rep. 85. And the jurisdiction of the courts of chancery may be exercised in cases of nuisance, and in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law would reach it. *City of Georgetown v. Alexandria Canal Co.*, 12 Peters, 91. Where the plaintiff can have as effectual and complete a remedy in a court of law, as that for which he invokes the aid of a court of equity—a remedy direct, certain and adequate, the defendant may insist that this remedy shall be sought for in this tribunal. But this objection to the exercise of jurisdiction ought to be taken in due order and apt time; for otherwise if it be one that the party may name, it will be deemed to have been waived, by failure to bring it forward to the notice of the court in limine. Where the objection has not been taken in the pleadings, but the defendant has expressly submitted to the jurisdiction of the court by praying it to decide on the question of his liability, the objection must be regarded as one not of strict right, but addressed to the sound discretion of the court. *Burroughs v. McNiell*, 2 Dev. & Batt. 217. See Waterman's Am. Ch. Dig. tit. JURISDICTION.

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Leveau
v.
Fowler.

DEVEAU v. FOWLER.

The creditors of a partnership have an equitable right to payment out of the partnership effects, in preference to the creditors of the individual partners.

Where, on the dissolution of a copartnership existing between D. & F., D. agreed with F. that F. should take all the stock and effects, and pay all the debts due by the firm, and afterwards F. became insolvent, and threatened to dispose of all the partnership property, and appropriate the same to his own individual use, leaving the debts unpaid; upon a bill filed for that purpose, an injunction was granted, restraining F. from disposing of the partnership property in a different manner from that stipulated in his agreement with D.

Where the administrator of a deceased partner assigned all his interest in the partnership effects to the survivor, under an agreement that the latter should discharge all the debts of the firm, it was held that this assignment and agreement did not destroy the lien or equity which existed in favor of each partner, on the dissolution, to have the partnership property applied to the payment of the partnership debts.

THIS was an application to dissolve an injunction, for April 17th.

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Deveau
v.
Fowler.



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want of equity appearing on the face of the bill. The parties were partners in the boot and shoe business. On the dissolution of the copartnership, it was agreed that the defendant should take all the stock and effects, and pay off all the debts due by the firm, and indemnify the complainant against the same. The bill alleged that the defendant was insolvent, and that he threatened to dispose of all the partnership property, and appropriate the same to his own individual use, leaving the debts unpaid. The complainant prayed for an injunction and receiver, and that the property and effects which formerly belonged to the firm might be applied in payment of the partnership debts.

W. Silliman, for the complainant.

J. Hoyt, for the defendant.

THE CHANCELLOR. The case of *Smith v. Haviland and Field*, before Chancellor Jones, in June, 1827, appears to be decisive as to the question raised by his bill. From the reporter's note of the decision in that case, with a copy of which I have been furnished, it appears that the administrator of a deceased partner assigned all his interest in the partnership effects to Haviland, the survivor, under an agreement that the latter should pay and discharge all the debts of the firm. The surviving partner became insolvent. The bill alleged that he had also assigned over his property, including the effects of the late firm, to Field, and that the complainant was apprehensive that the effects would be wasted, leaving the debts unpaid. It therefore prayed for an injunction; and that the property, or so much thereof as was necessary, should be applied to satisfy the partnership debts. A demurrer to the bill was overruled. The defendant Haviland then put in an answer denying the assignment, and also denying any agreement that the effects of the firm should be applied to the payment of the debts of the

partnership which had been assumed by him; and he insisted that the complainant had no interest in those effects, either under the agreement or otherwise; but that they were his sole property. The chancellor held that the effect of the agreement was to transfer all the equitable rights of the deceased partner to the survivor, who had the legal right before; he becoming responsible for the payment of all the debts of the firm, whether the property was sufficient to pay them or not. That the agreement only transferred the interest of the administrator in the surplus, if any there should be; but did not destroy the lien or equity which existed in favor of each, on the dissolution, to have the partnership property applied to the payment of the debts.

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*I can see no reasonable objection to this decision in point of equity, where the rights of bona fide holders of the property are not affected. It must therefore be considered the settled law of this court. Several questions of this kind have recently arisen in England. But as the decisions appear to have turned on the construction of a particular provision in their bankrupt law, giving the property to the creditors of such person as should be the visible owner, &c., I do not consider it necessary to notice them particularly. (In *Re Gilpin*, 3 Dow. & Ry. 636. *Ex parte Burton*, 1 Glynn & Jam. 207. *Ex parte Usborne*, id. 158. *Lingen v. Simpson*, 1 Sim. & Stu. 600.) It is a well settled principle of equity that the creditors of a partnership concern have an equitable right to payment out of the partnership effects, in preference to the creditors of the individual partners. The fair presumption, in the absence of any express agreement to the contrary, therefore, is, that it was not the intention of the complainant that the effects assigned to the defendant should be appropriated to the private use of the latter, leaving the debts of the firm unpaid.

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The motion to dissolve the injunction must be denied, with costs.

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Mead
v.
Merritt.

MEAD v. MERRITT AND PECK.

Where a party is within the jurisdiction of the court, and the court acquires jurisdiction of his person, it may, although the subject matter of the suit is situated elsewhere, by injunction and attachment, compel him to desist from commencing a suit at law either in this state or in any foreign jurisdiction; and may also in the same manner compel him to execute a conveyance or a release in such form as is necessary to transfer the legal title to the property in question, according to the laws of the country where the same is situated, or as will be sufficient to bar an action in any foreign tribunal.

The court of chancery, however, will not by injunction restrain a suit or proceeding previously commenced in a court of a sister state, or in any of the federal courts.

An executor or administrator cannot, either at law or in equity, set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he held the demand so purchased.

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It is against the principles of sound policy to permit executors to purchase up claims against the creditors of the estate of the testator, for the purpose of obtaining a set off in equity.

An executor cannot set off in chancery an original debt due to him personally, against a claim of the defendant on the estate.

Where there is no set off at law, there must be special circumstances of equity to authorize a set off in chancery.

April 19th.

S. SHERWOOD, who died in the state of Connecticut, was indebted to the defendant Peck; who afterwards transferred the demand to Merritt, in security for a debt due to the latter. After the death of Sherwood, the complainant, as his executor, obtained letters testamentary on his estate, before the court of probate in that state. He subsequently obtained from the same court an order for the sale of the testator's real estate, in Connecticut, for the payment of his debts. He also executed a bond with security according to the laws of that state for the faithful execution of his trust, and conditioned to pay to the creditors their respective portions of the estate of the decedent. A suit was afterwards commenced against the executor in the supreme court of this state, in the name

of Peck, to recover the amount of his debt out of the moneys in the hands of the former. The supreme court decided that a suit could not be sustained against the executor here, and that the remedy of the creditor was by a resort to the probate court under whose direction the estate had been sold. (*Peck v. Mead*, Exr. &c. 2 Wend. R. 470.) The executor thereupon filed his bill in this cause, alleging, among other things, that he had purchased a note against Peck, which he insisted was an equitable set off against the claim of the latter upon Sherwood's estate. He also alleged that the demand of Peck, who was insolvent, had been assigned to Merritt to defeat the complainant's claim to a set off; that the defendants were about to institute proceedings against him and his sureties in the state of Connecticut; and that by the laws of that state, he could not retain any part of the money of the estate in his hands to meet the note which he had obtained against Peck. The master allowed an injunction restraining the defendants from proceeding in that state *to recover the amount of their demand. On the coming in of the answer of Merritt, who denied all fraud in obtaining the assignment of the claim of Peck, an application was made to dissolve the injunction.

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W. Silliman, for the complainant.

W. N. Dyckman, for the defendant Merritt.

THE CHANCELLOR. Where a party is within the jurisdiction of this court, so that on a bill properly filed here, this court has jurisdiction of his person, although the subject matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction. And it may, in the same manner, compel him to execute a conveyance, or release, in such form as may

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be necessary to transfer the legal title to the property according to the laws of the country where the same is situated; or which will be sufficient in law to bar an action in any foreign tribunal. The court of chancery in England has even gone so far as to restrain the defendant from proceeding in a suit previously commenced in the court of sessions in Scotland. (*Bushby v. Munday*, 5 Mad. R. 297.) In that case Sir John Leach admits that, by the act of union, the courts of Scotland are entirely distinct and independent jurisdictions; and says that the same principles would apply were the suits which are sought to be enjoined pending in any foreign jurisdiction. Although this court has the physical power to act coercively on the parties within its jurisdiction to the same extent, it has frequently decided that it would not sustain an injunction bill to restrain a suit or proceeding, previously commenced in a court of a sister state, or in any of the federal courts. The same principle has been adopted by the supreme court of the United States. (*Driggs v. Walcott*, 4 Cranch, 179. *McKim v. Voorhees*, 7 id. 278.) And I am not aware that any court of equity in the union has deliberately decided that it will exercise the power, by process of injunction, of restraining proceedings which *have been previously commenced in the courts of another state. Not only comity, but public policy forbids the exercise of such a power. If this court should sustain an injunction bill to restrain proceedings previously commenced in a sister state, the court of that state might retaliate upon the complainant, who was defendant in the suit there; and, by process of attachment, might compel him to relinquish the suit subsequently commenced here. By this course of proceeding, the courts of different states would indirectly be brought into collision with each other in regard to jurisdiction; and the rights of suitors might be lost sight of in a useless struggle for what might be considered the legitimate powers and rights of courts.

The injunction in this case, so far as it operates to restrain the defendants from applying to the court of probates in Connecticut, to compel the complainant and his sureties to pay their demand out of the fund, which is under the exclusive control of that court, is directly opposed to these principles, which may now be considered the settled law of this country. The estate of the testator must be applied in satisfaction of his debts according to the laws of the state where he was domiciled, and where the property was situated. If those laws give it to the assignee of Peck, to the exclusion of the complainant's set off, the latter has no right to have a different rule of equity applied to his case here.

Independent of this question of jurisdiction, it is evident that the complainant has no right to the equitable interposition of this court. The note of Peck, which he purchased since the death of Sherwood, and now holds in his own right, could not, at law, be set off against Peck's demand upon the estate of the testator. And it would be inconsistent with the principles of sound policy to permit an executor to buy up claims against creditors of an estate, for the purpose of obtaining a set off in equity. In *Harvey v. Wood*, (5 Mad. R. 459,) Sir John Leach decided that an executor could not set off in chancery an original debt, due to him personally, against a claim of the defendant on the estate. That where there was no set off at law, there must be special circumstances of equity to authorize a court of chancery to *interfere. Here Merritt, who is the bona fide assignee of Peck, for a valuable consideration, has at least equal, if not superior equity. In such a case this court will not interfere and deprive him of his legal right.

The injunction must therefore be dissolved.

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Howland
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HOWLAND v. SCOTT.

Where S. owned a farm in the county of Queens, and about ten acres in addition, and made an agreement with F. to exchange with him the ten acres for six acres adjacent to the farm, and possession was respectively taken by S. and F.; and before the conveyances were executed on this exchange, S. mortgaged his farm to G., and by mistake included in the mortgage the ten acres instead of the six acres, and the mortgage was foreclosed in chancery in 1825, and the mortgaged premises ordered to be sold; and S., who was alone interested in the surplus to be raised on the sale, employed E., an auctioneer, to sell the property to pay off the mortgage; and the property was exposed to sale and bid in for S.; and E. also attended the master's sale as the agent of S., at which sale a map, which had been made of the farm, including the six acres, was exhibited, as containing the property to be sold; and the property was sold with reference to the map, and for an amount much exceeding the mortgage and costs, and H. became the purchaser; and after the sale, S. obtained the legal title to the six acres; and having received the surplus moneys and becoming insolvent, upon a bill filed by H., praying for a decree to compel S. to convey to him the six acres; *it was held*, that S. having obtained the whole consideration money for the land, including the six acres, under circumstances which amounted to a fraud upon H., S. would be considered as a trustee for H., and would be decreed to convey to H. the six acres.

April 20th. THIS cause was heard on pleadings and proofs. The facts are stated in the opinion of the court.

G. Brinckerhoff, for the complainant.

R. Emmet, for the defendant.

THE CHANCELLOR. From the pleadings and proofs in this cause, I consider the following facts established: Scott was the owner of a farm in the county of Queens, and of another piece of land of about 10 acres. He made an agreement *to exchange the ten acre piece with J. Fowler for six acres adjacent to the farm, and possession was taken accordingly. Before any conveyances were

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executed on this exchange, Scott mortgaged his farm to the Globe Insurance Company, and by mistake the ten acre lot was included in the mortgage, instead of the six which had been taken in exchange therefor. The mortgage was foreclosed in the equity court of the first circuit in May, 1825, and the mortgaged premises were ordered to be sold. Scott, the defendant, who was exclusively interested in the surplus to be raised on the sale, employed Sergeant, an auctioneer, to sell the property to raise the money to pay off the mortgage; and a map was made of the farm, showing its location and boundaries, and including the six acre tract. The property was put up and bid in for the defendant. Sergeant was then employed to attend the master's sale as auctioneer, and put up printed notices of the sale of the farm by the master, and the map was exhibited as containing the property to be sold. Sergeant attended the sale, and in fact acted as auctioneer, and as the agent of the defendant, to make the property produce its highest value. Sergeant denies that he acted as such agent at the request, or by the procurement of the defendant; but his statement is contradicted, in several important particulars, by the testimony of the master, and by that of Mr. Brinckerhoff and W. Jackson, as well as by the map which he exhibited at the sale. The weight of testimony is decidedly in favor of the fact that he acted as the agent of Scott, and with his consent and concurrence. The property was put up and sold with reference to the map then produced, and which included the six acres as a part of the farm. The bidders and the master understood it; and the latter, who knew the six acres were not in the description in the mortgage, supposed the object of the defendant was to increase the surplus by selling the six acres with the residue of the farm. Although Sergeant and Nelson knew the six acres were not included in the mortgage, I am satisfied the defendant attended the bidders should understand the property to be sold was that described and plainly marked as such on

1831.

Howland
v.
Scott.

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v.
Scott.

the map ; and there is not the least *doubt that they did so understand it, and bid accordingly, by which means a large surplus was produced beyond the amount of the mortgage and costs. If the defendant intended to insist upon the payment of the whole purchase money, and to retain the six acres to himself, under such circumstances, it was a gross fraud upon the purchaser, against which a court of equity is bound to relieve. Something was said as to the mistake about the six acres, before the purchase money was paid ; and probably the complainant was not bound to pay his bid until the question was settled, or the value of the six acres deducted. But I see no good reason why he should suffer because he thought proper to submit it to the court, to do him justice in the premises. The surplus was paid into court, and after the sale, Scott obtained the legal title to the six acres, by a conveyance from the person with whom the exchange had before been made. The complainant applied to the equity court, to compel the defendant to procure for him a good title as to the six acres ; and if he could not do that, to have the value thereof refunded to him out of the surplus money remaining in court. That court denied the application, and permitted the defendant to take the money out of court. This decision was reversed, on appeal to Chancellor Sanford ; but, in the mean time, the defendant obtained the surplus moneys from the clerk, and being insolvent, the complainant has now no remedy except against the land. The complainant asks a decree compelling the defendant to convey to him the six acres of land which is not included in the description in the master's deed. The defendant having obtained the whole consideration money therefor, and under circumstances which amounted to a gross fraud on the purchaser, I think Scott must be considered, in equity, as having taken the legal title from Fowler as a trustee for Howland. The defendant must therefore, within ten days after service of a copy of the decree in this case, convey to the com-

nant, by a good and sufficient deed to be approved 1831.
 by a master residing in the city of New York, the six In the matter
 es of land, and deliver possession thereof to him. He of Seaman.
 st also pay to the complainant his costs of *this suit [*409]
 be taxed, and the injunction must be made perpetual :
 l the complainant is to have execution to enforce the
 rformance of this decree, and compel the payment of
 h costs.

IN THE MATTER OF SEAMAN AND OTHERS, RECEIVERS,
 GUARDIANS, &C.

he proceedings in the cases of special guardianship to sell infants' es-
 es, must be filed in the office where the order for the appointment of
 guardian was entered.
 et compliance with the 154th rule requiring guardians, receivers
 committees to file inventories and accounts, will be rigidly enforced.
 linary cases, where a guardian, &c., neglects to comply with the
 an order will be made requiring him within twenty days after
 ice of a copy of such order on him personally, or at his residence,
 ase of his absence, to file the inventory and account, and to pay the
 ences of the order and proceedings thereon, or that an attachment
 e against him.
 he order must also contain a provision requiring the register or
 tant register to cause a copy of the same to be served, and to
 ify the default of the delinquent to the court, if he fails to comply
 a the order.
 e duty of the solicitor who procures the appointment of a guardian,
 to inform him of his duties under the rule, and how to perform
 n, and of the consequences of his neglect.

re assistant register, pursuant to the general rule of May 22d.
 court, presented a list or written statement of re-
 ars, guardians and committees who had neglected to
 their inventories and accounts, as required by the
 h rule. He suggested to the court that in consequence
 re proceedings, in the cases of special guardianships
 ll infant's estates, being sometimes filed and entered
 different office from that in which the order for the
 OL. II. 32

1831. appointment of the guardian had been entered, it became
In the matter difficult in such cases to ascertain whether the property
of Seaman, had been sold, and whether the special guardian was in
default.

[*410] THE CHANCELLOR said, that hereafter all the proceedings in such cases must be filed and entered in the office where the order for the appointment of the guardian was entered. He also said it was absolutely necessary to enforce the filing of these inventories and periodical accounts, in order to protect *the rights of orphan children, and others, whose property was placed in the hands of guardians, committees, &c. That it was the determination of the court to compel a strict compliance with this rule; and also with that which makes it the duty of the injunction masters to examine and report upon such accounts. He further stated that it was the duty of the solicitor who procured the appointment of a guardian, committee or receiver, to give him the necessary directions as to making out his inventory, and the mode of keeping and rendering his periodical accounts; and also to inform him of the consequences of his neglect to comply with this general rule of the court. That hereafter, if these inventories and accounts were not filed in due season, the court would direct the attorney general to prosecute the bonds of the delinquents and their sureties, or would proceed by attachment to enforce the performance of that duty.

May 30th. AFTER taking time to consider as to the best and least expensive mode of proceeding against the delinquent guardians, &c., the chancellor this day decided that in ordinary cases he would direct a special order to be entered, requiring the guardian, committee or receiver, within twenty days after the service of a copy of such order on him personally, or at his residence in case of his

absence, to file the inventory and account, and to pay the necessary expenses of the order and of the proceedings thereon, or that an attachment issue against him; and directing the register or assistant register with whom the order was entered, to cause a copy of the same to be served on the delinquent, and to certify his default to the court, if the terms of the order were not complied with, within the time prescribed.

1881.
In the matter
of Seaman.

The following was settled by the CHANCELLOR as a precedent of an order in such cases:

“In the matter of }
A. B. a lunatic. }

The *assistant* register of this court, [*or the clerk in this court for the first circuit,*] having presented a list or written statement of the several guardians, receivers and committees *whose appointments were entered in his office, and who have neglected to file their inventories, or accounts, for more than three months after the time limited for that purpose by the rules of the court; by which list or statement it appears that C. D. of Brooklyn, in the county of Kings, the committee of A. B. the above named lunatic, [*or the general or the special guardian of, &c.; or the receiver appointed in this cause,*] has neglected to file an inventory of the estate committed to his care, [*or the periodical account of his said trust,*] as required by the rules and practice of this court: It is therefore ordered that the said C. D. within twenty days after service of a copy of this order, file with the said *assistant* register [*or clerk*] the said inventory or account, as required by the 154th rule of this court; and pay to the said *assistant* register [*or clerk*] the costs of drawing and entering this order, and of all other proceedings thereon, or that an attachment issue against him. And it is further ordered that the said *assistant* register [*or clerk*] cause a copy of this order to be served on the said C. D. by the

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 Decaters
 v.
 La Farge.

delivery of the same to him personally, or, in case of his absence, to his wife or servant, or some member of the family at his dwelling house or place of abode; and if the said C. D. shall neglect to comply with the terms of this order, the said *assistant register* [or *clerk*] is further directed to certify such neglect to this court, on the next regular motion day thereafter, to the end that an order for an attachment may be entered thereon."

DECATERS AND OTHERS v. LA FARGE AND OTHERS.

Only the abbreviations of the pleadings and depositions in a cause for the use of counsel are taxable, and not full copies of such pleadings and depositions.

May 30th. ON the taxation of costs in this cause the complainants' solicitor charged for two full copies of all the pleadings and proofs in the cause for the use of his counsel. This charge being objected to on the part of the defendants, the question was, by consent of the parties, submitted to the court.

[*412] * *W. H. Harrison*, for the complainants.

P. S. Henry, for the defendants.

THE CHANCELLOR. The statute has prescribed the only allowance which is necessary or proper to be taxed against the opposite party in such cases. It is an allowance of three cents for each folio contained in the pleadings and proofs, for actually abbreviating the same for the use of counsel, other than the solicitor in the cause. This is the only item which is properly taxable. The counsel who is to prepare for the argument ought not to be encumbered with full copies of all the proceedings, containing long

and irrelevant matters. It is the duty of the solicitor to prepare for him an abbreviation, embracing only material facts and statements contained in the pleadings and proofs. The vice chancellor must be directed to allow these charges.

1881.

In the matter of Wilson.

THE MATTER OF WILSON AND OTHERS, INFANTS.

An application to sell the estate of an infant, under the statute, the court will appoint his general guardian, if he has one, as the special guardian.

However, it appears that the general guardian cannot procure the requisite security, another person may be appointed the special guardian to sell the property.

On an application to appoint a special guardian to sell the estate of infants, under the statute, it appeared that the infants had a general guardian appointed by the court, but a different person was recommended by him as special guardian.

June 7th.

CHANCELLOR said the general guardian of the infants was the proper person to be appointed to sell their real estate; and that another person ought not to be appointed for that purpose without some special reasons shown to the court. That such a proceeding would subject the infants to extra expense, and require two separate accounts and disbursements for their support.

On a subsequent day the father of the infants, who was their general guardian, presented a new petition, alleging that he was anxious to accept the trust himself, but that after diligent application, he was unable to procure the requisite security, as required by the rules of the court.

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An order was thereupon made for the appointment of another person as special guardian, for the purpose of the application.

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Townsend
v.
Townsend.

TOWNSEND v. TOWNSEND.

Where a plea to the bill has been overruled on the merits, the same matter cannot be set up in the answer as a bar to the suit, without the special permission of the court.

Where an interlocutory decision has been made, the court has no power to extend the time for appealing, it being fixed by statute.

Nor can the court vacate the order and cause it to be entered as of a more recent date, to enable a party to appeal therefrom.

May 26th

THE bill was filed in this cause by the husband against his wife for a divorce on the ground of adultery. The defendant pleaded a decree of separation between the parties to which they had both consented, as a condonation of the offence and in bar of the suit. On argument of the plea the same was overruled on the merits. And notice of the order overruling the plea was duly served on the solicitor for the defendant. After the time for appealing had passed, and the time for answering had expired, but before any order to take the bill as confessed had been actually entered,

R. Sedgwick, in behalf of the defendant, moved that the order overruling the plea be vacated and entered as of a more recent date, so as to give the defendant the right to appeal therefrom, and if that could not be allowed, he asked permission for further time to answer the bill, avowing his intention to set up the same matter in the answer as a bar to the suit. He cited *Mitf. Pl. 244*; *Hoare v. Parker*, 1 Cox's Ca. 228.

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H. Davies, for the complainant, insisted that as the time limited by law for appealing had actually expired, the court *ought not to make an order which would be a mere evasion of the statute.

THE CHANCELLOR decided that as the proceedings on the

part of the complainant had all been regular, and there had been no misapprehension or mistake on the part of the defendant's counsel, it was not in the power of the court to extend the time for appealing. Such a proceeding, he said, would be a virtual repeal of the statute; that this case differed from that of *Smith v. Smith*, (1 Paige's R. 391,) where the time for appealing was prescribed by a rule of the court. But he gave the defendant time to put in an answer, provided she did not set up the same matter, which had been decided on the plea to be insufficient, as a bar to the divorce.

1831.
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v.
Townsend.

THE counsel for the defendant asked the chancellor to reconsider the latter part of the above decision. He insisted that the defendant had the right, without any permission from the court, to set up the same matter in the answer in bar of the suit, which had been previously overruled in the form of a plea. To this point he cited Mitf. Pl. 244; 3 P. Wms. 95; 2 Ves. sen. 491; 1 Atk. 450; 1 Cox's Ca. 228.

THE CHANCELLOR. After a full examination of all the authorities on this question, I find myself strengthened in the opinion before expressed, that the defendant cannot set up in the answer, as a bar to the suit, the same matter which has been overruled, on the merits, in the shape of a plea. Most of the cases cited by the defendant's counsel were examined by Sutherland, J. and Colden, senator, in the case of *Murry v. Coster*, (4 Cowen's R. 617,) and those judges evidently came to the conclusion that the expression in Lord Redesdale's Treatise was too general; and that, taken in the broad sense contended for by the counsel of the defendant, it was not sustained by the authorities there referred to. Those cases only establish the principle that where a plea is merely informal, or

1831. where it may be a good answer as to some part of the bill
 Townsend only, the court permits it either to stand for an answer
 v. *with leave to except, or what amounts to the same thing
 Townsend. in fact, gives special permission to the defendant to insist
 upon the same matters in his answer, in bar of the relief, but not in bar of the discovery sought by the bill. This is probably what Lord Redesdale means when he says: "If a plea is overruled, the defendant may insist on the same matter by way of answer." The same expression was used by Chancellor Kent in *Goodrich v. Pendleton*, (4 John. Ch. R. 551.) This expression was perfectly proper in the sense in which it was there used, although he says nothing as to the leave of the court. He was merely elucidating the proposition that whatever was a good bar to the action, if insisted on by way of plea, would be equally valid if the same defence was set up in the answer. But in a subsequent case, (*Coster v. Murry*, 7 John. Ch. R. 172,) he expresses his opinion, that there is no case in which the same matter which has been decided to be invalid as a plea, has been permitted to be insisted on in the answer, even to a bill for relief, without the leave of the court. The expression of Lord Thurlow, in *Hoare v. Parker*, (1 Cox's Ca. 228,) evidently means that he knows of no instance where upon the disallowance of a plea to the discovery, the court have given permission to the defendant to insist upon the same matter in his answer as a bar to the discovery. He recognizes the principle that the court will give permission to the party to insist upon the same matter in bar of the relief; but he nowhere intimates that it can be done, even as to the relief, without special leave of the court.

The practice of the court of chancery in this respect is perfectly analogous to that of courts of law. There, if the defendant demurs to the declaration, and the demurrer is overruled, the party cannot be permitted to make the same objection by motion in arrest of judgment, unless that right is reserved; but if the right is reserved, he may

in arrest, although the same question might have
 determined on the demurrer. (*Pittstown v. Platts-*
 15 John. R. 441. 18 id. 418.) So, if the court de-
 against the validity of a plea in bar, on the merits,
 fendant will not be permitted to give the same facts
 dence on the trial, under his notice with the general

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 Fitch
 v.
 Hazeltine.

nd not the party avowed his intention of setting up
 atters of the plea again in his answer, the necessary
 pience of which would be to produce delay and
 se to the complainant, the order for leave to answer
 have been general. But when a party applies to
 urt for a favor, and at the same time signifies his
 ion to proceed irregularly if the favor is granted, it
 es the duty of the court to insert such restriction in
 der as will prevent the irregularity. If the counsel
 has confidence in the validity of the plea, it is to
 retted that the defendant has not taken the proper
 to bring the question before the court of dernier

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But I cannot permit her to violate the established
 oles of the court, to enable her to do that indirectly
 perhaps she cannot now accomplish in any other

order giving her permission to answer must there-
 entered according to the former decision. .

ITCH AND ANOTHER v. HAZELTINE AND ANOTHER.

n order to produce witnesses had been extended by the agreement
 parties, it was held, that an order to extend the time to produce
 ces, obtained upon an application ex parte to the chancellor, after
 ne limited in the first order had expired, but before the expiration
 time as enlarged by the agreement, was regular.
 re the agreement to enlarge the time to produce witnesses con-
 a stipulation that the defendant should have 15 days to produce
 ny on his part, after the examination of a witness named on the

1831.

Fitch
v.
Hazeltine.

part of the complainant had closed, it was held, that this fact should have been stated in the affidavit presented to the chancellor upon the ex parte application, so that a similar provision might have been inserted in the order granted by him; it was also held, that the affidavit should have stated that the time to produce witnesses had been once extended by stipulation, so that the chancellor might have taken this circumstance into consideration in deciding upon the propriety of granting further time.

June 9th

[*417]

AFTER the usual order to produce witnesses had been entered in this cause, and notice thereof served, the parties entered into a stipulation to extend the time to examine the witnesses until the 1st of May, 1831. It was also stipulated, that if the complainants examined W. H. Seward as a witness, the *defendant should have 15 days, after such examination, to produce testimony on his part. On the 25th of April the solicitor for the complainant presented an affidavit to the chancellor, stating, among other things, that the time for taking testimony in the cause would expire on the 1st of May. On this affidavit an ex parte order was obtained, extending the time to take testimony for sixty days.

J. Edwards, in behalf of the defendant, moved to set aside this order for irregularity. He insisted that it was irregular to obtain an ex parte order, after the time limited by the original order had expired; although the time had been extended by stipulation. At all events, he said, it was improper to obtain a general order ex parte, thereby annulling the agreement respecting Seward's examination, contained in the stipulation.

J. Rhoades, contra, contended that under the 86th rule, one order to extend the time might be obtained without notice, although the time had been previously extended by a stipulation between the parties.

THE CHANCELLOR. The 86th rule makes no exception of the case where the time to produce proofs has been

extended by the consent of the adverse party. In respect it differs from the 125th rule, which contains express provision for such a case, in relation to answers replications. It was not therefore irregular to make application, ex parte, within the time given by the relation. As the time was enlarged by the agreement of the parties, it had not actually expired at the time the ex parte order was obtained. But as the time had been enlarged by stipulation, that fact should have been stated in the affidavit, to enable the chancellor to judge whether the time ought to be granted under such circumstances. A special agreement as to the examination of Seward should also have been stated, so that a similar provision might have been inserted in the order. If the facts had been stated, as they now appear, I should have extended the time, on the ex parte application; but I should have directed the same provision to be inserted in the order which the parties had agreed to in their stipulation. An application to set aside the order for irregularity is granted, but without costs; and the defendants are to have delays, after the examination of Seward, to produce evidence in proof, provided he is examined as a witness on the part of the complainants, as provided for in the stipulation.

1881.

Stoors
v.
Kelsey.

[*418]

STOORS AND OTHERS v. KELSEY AND OTHERS.

Where there is no allegation of fraud or collusion between the complainant and the sheriff, the return of an execution at law unsatisfied is sufficient to authorize the filing of a judgment creditor's bill, although the sheriff has told the defendants had some interest in property which might be subject to the execution.

A sheriff improperly returns an execution unsatisfied, when there is property of the defendant in his bailiwick sufficient to pay the judgment, or wholly or in part, the proper remedy of the defendant is by an application to the court out of which the execution issued, to set aside the return; or by a suit against the sheriff.

1881. This was a judgment creditors's bill, filed upon the
 Stoors return of an execution unsatisfied. After the coming in
 v. of the answer of the defendants,
 Kelsey.

June 9th. *J. Harris*, in behalf of the complainants, applied for
 the appointment of a receiver.

L. Hoyt, for the defendants, resisted the application, upon the ground of a statement contained in their answer that they were the owners of a lot of land, the value of which exceeded the amount of a mortgage charged thereon; and that before the return of the execution, they gave notice to the sheriff of the fact, and requested him to advertise the lot for sale; but that he refused to do so, and returned the execution unsatisfied.

[*419] THE CHANCELLOR. As there is no allegation of any fraud or collusion between the complainants and the sheriff, or that the former had any notice of the alleged interest of the defendants in the lot at Buffalo, the return of the sheriff was *sufficient to authorize the filing of this bill. If the sheriff has made a false return, by which the defendants have been subjected to the costs of these proceedings, they may recover their damages in an action against him; or they might have applied to the supreme court to set aside the return. This court has no jurisdiction to grant such relief, in a suit to which the sheriff is not a party. (*Stratford v. Twynam*, Jac. R. 418.) Besides, it is not pretended that the property was sufficient to satisfy the whole, or any considerable part of the judgment. The object of the defendants was probably to create delay, until they could place their other property beyond the reach of these creditors. The order for the appointment of a receiver must therefore be granted; and the defendants must be left to their remedy, if they have any, against the sheriff.

1881.

Kline

v.

L'Amoureux.

KLINE AND OTHERS v. L'AMOUREUX, COMMITTEE OF
STAFFORD.

An infant is only liable for necessities, when he has no other means of obtaining them except by the pledge of his personal credit. If the infant is under the care of a parent or guardian, who has the means, and is willing to furnish what is actually necessary, he cannot, without the consent of such parent or guardian, make a binding contract for articles which, under other circumstance, would be deemed necessities.

Where a person deals with an infant, he is bound, at his peril, to inquire and ascertain the real circumstances of the infant, and whether he is in a situation to bind himself by a contract for necessities.

THIS cause was heard on exceptions to the report of master Hoyt, disallowing the claims of the petitioners against the estate of John Stafford in the hands of his committee. By the evidence before the master, it appeared that the father of John Stafford died in October, 1819, leaving him then about 19 years of age, and entitled to a very considerable estate. In November of the same year, Spencer Stafford, the uncle of John, was appointed his guardian, by the surrogate of the county of Albany, and assumed the discharge of that trust. The guardian provided suitable boarding places for his ward, who was idle and dissipated, and made every exertion to *withdraw him from his dissolute associates, and to prevail upon him to undertake some useful and regular employment. The guardian was at all times able and willing to furnish his ward with all necessary clothing, &c.; and he gave notice to the public not to trust him. John Stafford, the ward, was however boarded, and furnished with liquor, clothing, money, horses, carriages, &c., by the petitioners and others, for which they now claimed compensation from his estate. Within a few days after John Stafford became of age, Judge L'Amoureux was appointed the committee of his estate, under the act concerning habitual drunkards; and some of the claims of the petitioners were for articles

June 21st.

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1881. furnished to Stafford after that period. The master allowed to one of the petitioners a small claim for a debt contracted after Stafford became of age, and before the appointment of the committee, but disallowed all the rest. To this decision of the master, the petitioners, whose claims were disallowed, excepted.

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v.
L'Amoureux

P. Gansevoort, for the petitioners.

J. L'Amoureux, committee, in person.

THE CHANCELLOR. An infant is liable for necessities, suitable to his rank and condition, when he has no other means of obtaining them except by the pledge of his own personal credit. But if he is under the care of a parent or guardian, who has the means, and is willing to furnish him what is actually necessary, the infant can make no binding contract for any article whatever, without the consent of his legal protector and adviser. In *Brainbridge v. Pickering*, (2 W. Black. R. 1325,) the court held that an infant could not bind herself to a stranger, under such circumstances, for what might otherwise be allowed as necessities. A similar decision was made by the court of appeals of South Carolina, in the case of *Hull v. Connolly*, (3 M'Cord's L. R. 6.) In this case, it appears that the guardian made suitable provisions for the clothing and sustenance of his ward, and endeavored to withdraw him from his vicious courses. Probably he might have succeeded, had it not been for the aid furnished to this profligate young man by the petitioners and *others. Some of them must have known that he was selling his clothes, and squandering the means they furnished him, to obtain liquor, and to defeat the plans which were formed for his reformation. Those who had actual knowledge of the facts deserve punishment rather than compensation. It is probable some of the petitioners were not aware that he was a minor and had a guardian; but that will not

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make his contract binding for articles which were not necessary, under the actual circumstances. In *Ford v. Fothergill*, (1 Peake's N. P. 230,) Lord Kenyon decided that an infant was not liable for clothing, where it was proved that his father furnished him with all that was actually necessary. He says: "Whether he was living with his father or not, the person who dealt with him was bound to inquire and know who he was." Here, it was known to every one who was acquainted with the infant, that he was idle and intemperate. If they chose to furnish him supplies, under such circumstances, without any inquiries as to the actual situation of the property, or as to his ability to contract, they must bear the loss. Hundreds of young men of property have been irretrievably ruined, especially in our large cities, by being furnished with supplies, under the pretence of their being necessities, contrary to the wishes of their parents and guardians. It is to be hoped the legislature will interfere, and make it a criminal offence for any person, knowingly, to interfere with parental authority, or the rights of guardianship, in furnishing indiscreet or profligate young men with the means to continue in their vicious courses. In a recent case in the city of New York, a minor who had been ruined by such conduct, and to whom money had been loaned at a most enormous rate of interest, was persuaded by the usurer to bind himself by oath to pay the whole amount when he should become of age, without making any objection to the legality of the loan. Such things, I am informed, are quite common in some of our cities.

Although this case is not one of that aggravated character, it is nevertheless impossible to allow these claims without overturning settled principles which are very essential to the peace and happiness of private families, and to the preservation of *public morals. The master, therefore, has decided correctly. The exception must be overruled, with costs to be paid by the petitioners who have excepted, and the report is confirmed. As the peti-

1831.
Kline
v.
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[*422]

1831. tioners have brought their claims before the court in the
 L'Amoureux least expensive manner possible, and as the estate in the
 v. hands of the committee is ample, I shall not charge them
 Crosby. with costs on the reference. But as they appealed from
 a correct decision of the master, after all the facts of the
 case had been fully ascertained, they cannot be excused
 from the payment of that part of the expense occasioned
 by such appeal.

L'AMOUREUX, COMMITTEE OF STAFFORD, v. CROSBY.

Where the defendant, an inn-keeper, persisted in harboring an infant, and furnishing him with supplies against the will, and contrary to the express directions of his guardian, who was endeavoring to reform his dissipated habits, the court of chancery would not permit the defendant to retain the fruits of his improper conduct out of the estate of the infant. And the defendant having obtained a judgment bond from the infant during his minority, and another a few days after he became of age, but which was overreached by an inquisition finding him incompetent to contract on account of habitual drunkenness, both judgments were decreed to be set aside and cancelled.

The statute gives the court of chancery the exclusive care and custody of the persons and estates of idiots, lunatics, and habitual drunkards; and all contracts made by them, and all gifts of their property or effects, after the actual finding of an inquisition declaring their incompetency, are actually void.

The inquisition is only prima facie evidence of the invalidity of an act done by the lunatic or drunkard before the issuing of the commission, but which is overreached by the finding of the jury.

It is a contempt of the court for a person to interfere with the property of a lunatic, &c., after he is informed of the institution of proceedings to declare his incompetency.

After the finding of an inquisition declaring the incompetency of the lunatic, &c., the proper remedy of creditors is by an application to the court, by petition, for the payment of their debts, if the committee decline discharging them without the direction of the court; and if their demands are disputed or doubtful, it may be referred to a master to ascertain whether they are equitably due.

It is not proper to subject the estate of the lunatic, &c., to the expense of a proceeding by bill against his committee, except by the direction of the

court; and it is a contempt of the court to commence a suit at law without its permission.

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The statute having given to the court of chancery the exclusive jurisdiction in such cases, and charged it with the duty of providing for the payment of the debts of the idiot, lunatic or drunkard, out of his estate, the chancellor will see that the legal and equitable rights of the creditors are protected and enforced. But this must be done according to the usual forms of proceedings in this court, or under its direction.

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THE bill in this cause was filed to set aside two several judgments against John Stafford, entered up on bonds and warrants of attorney; the one obtained while he was an infant, and the other after he had been found incapable of managing his estate by reason of habitual drunkenness. The facts are sufficiently stated in the opinion of the court, and in the preceding case of *Kline and others v. L'Amoureux*. (Vide ante, p. 419.)

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J. L'Amoureux, in person. The several contracts, made by John Stafford and the defendant previous to the former arriving at the age of twenty-one, including the first judgment, were not binding on Stafford: 1st. Because he was an infant, and the articles furnished were not of the class called necessities; 2d. If all or any of the articles furnished Stafford were of the class called necessities, still the contracts were not binding on him, as he had a faithful guardian who fully provided for him. The presumption is in favor of the guardian until strong circumstances of suspicion are shown against him.

When Stafford confessed the second judgment his estate was so far in the custody of the law as to prevent its being affected by the acts of an individual; especially when that individual acts with a full knowledge of all the facts.

The court of chancery is the general guardian of idiots, lunatics and habitual drunkards, and the general trustee of their property; and when the court has signified its intention to take the charge of their persons and property by committing them to a guardian and committee, though

1881. it does not accomplish it in a given time, yet it will not
 L'Amoureux suffer itself to be outdone by an individual. The act of
 v. the defendant in obtaining the second judgment was a
 Crosby. contempt of the court.

[*424] It was found by the inquisition that Stafford had been incompetent to contract for two years. Of the finding of this *inquisition the defendant had notice. He aided in the opposition made to it. An inquisition found under such circumstances is, at least, prima facie evidence of the incapacity of Stafford to contract. If, however, Stafford was not entirely incompetent to contract and dispose of his property, at the time he confessed the second judgment, either on the ground of his property being in the custody of the law, or of the entire imbecility of his mind; yet, the second judgment, under the circumstances of this case, is void, it having been fraudulently obtained.

Fraud is divisible into four heads: 1st. Actual fraud, by suppressing the truth, or suggesting falsehood; 2d. That which is apparent from the intrinsic nature and subject of the agreement itself; 3d. That which arises from the circumstances and condition of the contracting parties; 4th. Fraud on creditors. (Newland on Contracts, 352.)

The present case is one under the third head. The contracts with Stafford being highly immoral and unconscionable, the weakness of his mind furnishes the strongest evidence of fraud. Several principles have been settled which entitle us to the relief we ask. It has been held that where an unconscientious advantage has been taken of the situation of a person, although not fraud in contemplation of law, chancery will relieve. (*Lyon et al. v. Tallmadge et al. on appeal*, 14 John. R. 501.) So a court of chancery will recognize an imbecile state of the human mind which is short of idiocy or lunacy. (In the matter of *J. Barker*, 2 John. Ch. R. 232.) And weakness of understanding is an item in the proof of fraud, against which a court of equity will relieve, when it can be collected from the circumstances. (*Jackson v. King*, 4 Cowen's

R. 207.) And where an infant has been unwarily entrapped, immediately on coming of age, into a ratification of his acts while an infant, equity will relieve him from such ratification. (Bingham on Infancy, 69. *Brook v. Gally*, 2 Atk. 34. 2 Starkie, 723. 2 Mad. Ch. R. 753.) Fraud at law must be proved, but in equity it may be presumed. A lunatic may, or may not be made a party in a suit, to avoid his acts before inquisition found. (In the matter of Hallock, 7 John. Ch. R. 24.)

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**J. V. N. Yates*, for the defendant, contended, 1st. That John Stafford, after he became twenty-one, and before any committee was appointed for him, ratified and confirmed the debt due to the defendant; 2d. That he was not incapable to do so, by reason of mental imbecility, or of drunkenness; 3d. That the debt due the defendant was moderate in amount, (about \$400 only;) that not one eighth part of it was for liquor; that John's estate was large, and the defendant's claim, so far from being large, or extravagant, was the reverse; 4th. That the complainant, by filing the bill, and persevering therein to the hearing of this cause, has exhibited a greater disregard of the interests of John, and has committed a greater waste of his property, than that which he professes to prevent; 5th. That he ought to pay defendant's costs out of his own pocket: or, 6th. Out of the funds or estate of John. In support of these positions he cited the following cases: *Tiernan v. Wilson*, 6 John. Ch. R. 411; 3 Bac. Abr. 611; 2 Str. 690; *Borthwick v. Carruthers*, 1 Durn. & East, 648; Abr. Eq. 282; High. on Lun. 106, 111, 115, 118, 119, 181.

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The counsel also insisted that the case in *Brook v. Gally*, (2 Atk. 34,) had no analogy; that there the infant had seven shillings sterling a week, pocket money, (nearly two dollars;) here he had scarcely any; that there the infant went to school, and the tavern keeper often concealed and deceived him; not so here. And that even in

1831. that case the court allowed a suit at law to be brought, to
L'Amoureux try the question of consideration.

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THE CHANCELLOR. In the case of *Kline and others v. L'Amoureux*, which has just been decided, the facts as to this young man, and the law in relation to contracts made with an infant under such circumstances, are fully stated. It is therefore unnecessary again to repeat what was said in that case. There are, however, in this case some facts which require particular comment. It appears by the testimony of the guardian that soon after his appointment he called upon the defendant, in a friendly manner, and informed him of the appointment; and stated to him that he provided everything necessary for the infant, and permitted him neither to buy nor sell. *He also requested of the defendant, as a particular favor, that he would neither harbor nor trust his ward. Notwithstanding this friendly admonition of the guardian, and his subsequent remonstrances, the defendant persisted in harboring and furnishing the infant with supplies; and by this course of conduct he probably contributed as much as any other person to the absolute ruin of this unfortunate young man. Under such circumstances it is not material to go into the inquiry, which was objected to on the examination of the witness, whether he was not in the habit of seducing minors, and drawing them into haunts of vice and intemperance, for the purpose of afterwards defrauding them of their property. His conduct in harboring and trading with the infant, in defiance of the rights of the guardian, would have been sufficient to have induced the English court of chancery to commit him to the Fleet prison. And it is sufficient here to make it the duty of this court to deprive him of the fruits of his illegal and improper conduct, unless there is some unbending rule of law which prevents the exercise of the power. It therefore remains to be seen whether the complainant is entitled to the relief sought by his bill.

The first judgment bond was obtained from Stafford during his infancy, and to cover an account for articles which never were of the least possible benefit to him or his estate. It is also overreached by the inquisition, made by one of the most respectable juries that could be obtained in the city of Albany, under the advice and direction of a most able and competent board of commissioners. By the inquisition it is found that, at the time of the execution of that bond and warrant, Stafford, in addition to the disability arising from his infancy, was incompetent and unfit for the government of himself or his estate in consequence of habitual drunkenness. Although this finding is not conclusive evidence against the defendant who has neglected to traverse the inquisition; yet, in connection with the other testimony in the cause, it is sufficient to satisfy me that the judgment could not be reversed, even if Stafford had been of full age at the time that bond and warrant were executed. The same remarks are applicable to the second judgment. But as there is another insuperable objection. When the last bond and warrant were executed this court had not complete jurisdiction and control over the property of Stafford, not only by the *lis pendens* which was created by presenting the petition for a commission, but by the actual finding of an inquisition declaring him incompetent to manage his estate. The statute gives this to the exclusive care and custody of the persons and officers of all idiots and lunatics.[1] By the act of March

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See Waterman's Am. Ch. Dig. tit. IDIOTS AND LUNATICS. A person found dumb from his nativity is not, therefore, an idiot, or non compos mentis; though such perhaps may be the legal presumption, until his mental capacity is proved on an inquiry and examination for that purpose. *Wright v. Fisher*, 4 Johns. Ch. Rep. 441. A marriage of an idiot or lunatic is void; but it should be declared void by the judicial decision of some court of competent jurisdiction. *Wightman v. Wightman*, 4 Johns. Ch. Rep. 45. A lunatic, who has been found so by an inquisition, may, if he is able to reason, make a will, although the decree assigning him a guardian remains unreversed. *Stone v. Daman*, 12 Mass. Rep. 498. It is

1831. 16th, 1821, which was in force when these proceedings
 L'Amoureux were instituted, the same jurisdiction was conferred as to
 v. the estates of habitual drunkards; and by the revised
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not every case of mental weakness or imbecility which will authorize the court of chancery to exercise the power of appointing a committee of the person and estate. But to justify the exercise of the power, the mind of the individual must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *In the matter of Morgan*, 7 Paige, 236. It is not sufficient on a commission of lunacy, for the jury to find that the individual proceeded against is incapable of managing his affairs or governing himself, in consequence of mental imbecility and weakness. *Ib.* To authorize the court to appoint a committee upon the presumption that his mind is so far impaired as to reduce it to the standard of idiocy, the jury must find distinctly that he is of unsound mind, and mentally incapable of governing himself or of managing his affairs. *Ib.* Insanity is not always obvious; whether it did or did not exist at a particular period is oftentimes a perplexing question for courts and juries. *Singleton's will*, 8 Dana, 221. Indicia of monomania stated. *Ib.* Where the devises, conveyances, and contracts of an imbecile person have been set aside, they were held void, not on account of the general and positive disability of the party to perform all similar acts, but because the whole transaction with its accompanying circumstances, including of course the fact of mental imbecility, evinced that his consent was wanting to the particular act, the subject of adjudication. *Stewart's executor v. Lispenard*, 26 Wend. 255. The fitness and propriety of the act itself are regarded as an essential and most important part of the evidence of capacity. *Verplanck, senator*, *ib.* 313. If the estate of a lunatic be expended in his support, the court will, on petition of his committee and report of a master, order the lunatic to be delivered over to the overseers of the poor. *Matter of McFarlane*, 2 Johns. Ch. Rep. 440. In the management of the lunatic's estate, the interest of the lunatic is more regarded than the contingent interest of those who may be entitled to the succession; and the court, if it be for the interest of the lunatic, may direct real estate to be converted into personal, or personal into real. Thus it may direct timber standing to be sold. *Matter of Salisbury*, 3 Johns. Ch. Rep. 347. A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by decree of the court of chancery, upon his giving a bond and security according to law. *Coleman's case*, 4 Hen. & Munf. 506. The court of chancery in New York having, by statute, the care and custody of idiots and lunatics, has the entire jurisdiction of the subject; and it rests in the sound discretion of the court to direct the manner in which the question of lunacy shall be tried. Generally, the verdict of a jury is the most satisfactory upon an issue made up and prepared for trial under the direction

But the same authority is extended to their persons

O. The inquisition under the commission of this court is in the nature of an inquest of office at the common law.

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This court. *Matter of Wendell*, 1 Johns. Ch. Rep. 600. An inquisition lunacy, taken abroad, or in a foreign state, is not sufficient to authorize sale of the lunatic's estate for his maintenance, but it is sufficient to authorize the issuing a new commission here, and may perhaps be sufficient ground of evidence to warrant an inquisition here on such new commission. *Matter of Perkins*, 2 Johns. Ch. Rep. 124. A commission of lunacy may issue against a person resident abroad. *Ib.* A commission in nature of a writ de lunatico inquirendo will be awarded in the case of a person feeble and incapable of managing his affairs, from old age, sickness, or other cause, and upon the return of the inquisition, a committee of his estate will be appointed. *Matter of Barker*, 2 Johns. Ch. Rep. 232. On proof that the lunatic had recovered his senses, a commission of lunacy is superseded. *Ex parte Drayton*, 1 Desau. 144. On a petition, by a lunatic, to supersede the commission, and to be restored to his estate, on recovery, the court will either order it to be referred to a master to take proof as to the allegation in the bill, and to examine the lunatic if he thinks fit, and to report the proof and his opinion thereon, or direct the lunatic himself to attend in court to be examined by the chancellor. *Matter of Hanks*, 2 Johns. Ch. Rep. 567. On the petition of a lunatic for discharge of his committee on the ground of restored sanity, it is in the sound discretion of the court to allow him to traverse the inquisition, to try the question on a feigned issue. And, if the lunatic make related application, the court may, in its discretion, order the costs of the proceedings to be paid by the lunatic himself, or his friends, and not to come out of his estate. *Matter of McLean*, 6 Johns. Ch. Rep. 440. Any behavior in the execution of a commission is a good ground for quashing it, and although there may have been some irregularity in the proceedings, yet if, as in this case, substantial justice has been done, the court will set aside the inquisition and order a new one. *Ex parte Glen*, 4 Desau. 549. The jurisdiction of the court over the person and property of persons of unsound mind is not restricted to cases of idiocy or lunacy, strictly speaking; it extends also to cases of every person who, in consequence of old age, disease, or any other cause, is in such a state of mental feeblity as to be incapable of conducting his affairs with common prudence, and leaves him liable to become the victim of his own folly, or the fraud of others; but the jurisdiction should be assumed and exercised with great caution, and the case should be clear. *Naylor v. Naylor*, 4 Dana, 1. Where the chancellor becomes satisfied that a person who has been found to be a lunatic upon an inquisition issued out of the court for that purpose, has so far recovered his reason as to be capable of disposing of his estate, by will, with sense and judgment, he has the power to suspend

1831. As to acts done by the lunatic or drunkard before the issuing of the commission and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive but not conclusive evidence of incapacity. But all gifts of the goods and chattels of the idiot, lunatic, or drunkard, and all bonds or other contracts made by him after the actual finding of the inquisition declaring his incompetency, and until he is permitted to assume the control of his property by the permission of the court, are utterly void. This doctrine is fully stated in *Beverly's case*, (4 Coke's R. 126, b. 127, a.) The same opinion is intimated by the supreme court of Massachusetts, in *White v. Palmer*, (4 Mass. R. 147.) Although that court afterwards decided that a lunatic restored to his reason might make a valid will, even if there had been no formal revocation of the letter of guardianship, they conceded that the finding of the judge of probates was evidence of incompetency at the time his decree was the proceedings against such lunatic partially, so as to enable him to make a will. In *the matter of Burr*, 2 Barb. Ch. Rep. 208. But the chancellor will direct such will to be made under the superintendence of some proper officer of the court, in order to guard such a testator against the immediate exercise of any undue or improper influence. Ib. The court of chancery has the power to suspend the operation of a commission and an inquisition, in a case of lunacy, so far as to allow the individual who had been found to be a lunatic to make a testamentary disposition of his property, without discharging the proceedings entirely and restoring him to the full control of his property for any purpose. Ib. The New York court of chancery has jurisdiction to issue a commission of lunacy where the lunatic has lands in that state, although the lunatic is domiciled abroad. In *the matter of Giles*, 9 Paige, 416. (Vide 2 Johns. Ch. Rep. 124 ; 2 Paige, 174.) The court of chancery, in the exercise of its discretion, may authorize the committee of a lunatic to apply the personal property for the improvement of unproductive real estate, by the erection of buildings thereon, &c. In *the matter of Livingston*, 9 Paige, 440. The court of chancery has the power, out of the surplus income of the estate of a lunatic, to provide for the support of persons not his next of kin, and whom the lunatic is under no legal obligation to support, where it satisfactorily appears to the chancellor that the lunatic himself would have provided for the support of such persons had he been of sound mind. In *the matter of Heeney*, 2 Barb. Ch. Rep. 326. (Vide Craig & Phil. Rep. 76.)

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e. Here the defendant admits that he took this last
 l and warrant two days after the jury had found Staf-
 incompetent to contract; and with a full knowledge
 l the circumstances. It was therefore an unwarrant-
 interference with the proceedings and powers of this
 t to attempt to get a judgment by confession against
 and to seize upon his property by an execution at
 without the permission of the chancellor. And prob-
 if the court had been applied to in a *summary
 the defendant would have been punished for the
 empt and compelled to discharge the judgment. It
 contempt of this court even to commence a suit at
 against the lunatic, without permission, after notice
 ie inquisition declaring his incompetency. (See *Sweet*
wife v. Austin, Vern. & Scriv. R. 306.) If any per-
 as a legal or equitable claim against him or his estate,
 proper course is to apply to this court by petition for
 payment thereof; and if the claim is disputed or
 tful, it may be referred to a master to ascertain the
 . It is not proper even to subject the estate to the
 use of a proceeding by bill, except by the direction
 ie court. The statute having given to this court ex-
 ve jurisdiction in such cases, and charged with the
 of providing for the support of the lunatic and his
 ly, and for the payment of his debts out of the estate,
 hancellor will see that the legal and equitable rights
 ie creditors are protected and enforced. But this
 be done according to the usual forms of proceeding
 is court, or by suits instituted under its direction.
 e of the creditors will be permitted to take the law
 their own hands and mete out justice to themselves
 ding to their own ideas of their equitable rights.
 nder the circumstances of this case, I am satisfied
 the defendant has no legal or equitable claim to be
 out of the estate of this young man for the means he
 urnished towards his ruin. There must therefore be
 decree, in favor of the complainant, declaring the bonds

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of Hornby's have been improperly and inequitably obtained from
will Stafford, without any beneficial or sufficient considera-
tion ; and while he was legally incompetent to make any
valid contract, affecting his estate. The defendant must
cancel the judgments on record. The injunction hereto-
fore issued, and continued by the decision of the late
chancellor, prohibiting all proceedings at law on those
judgments against the estate of Stafford, must be made
perpetual ; and the defendant must pay to the complain-
ant the costs of this suit to be taxed.

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*IN THE MATTER OF HORNBY'S WILL.

The sound construction of the 12th and 16th sections of the act of April, 1830, amending the revised statutes, is that the chancellor may issue a commission to prove a will, either of real or personal estate, in any case where, from the absence of the will or the non-residence of witnesses in this state, it cannot be proved before the surrogate.

Such commission may be issued by the chancellor, although all the subscribing witnesses to the will are dead ; but, in such a case, the proof taken will have no greater effect as evidence, than a will proved before a surrogate without producing any of the subscribing witnesses thereto. The chancellor alone can grant a commission to take proof of a will out of the state, and it cannot be issued by the direction of a vice chancellor. All the proceedings must be entered in the office of the register at Albany.

June 21st. In this case a commission was duly issued to take the proof of the validity of the will of William Hornby, late of London, deceased. By the evidence taken under the commission, it appeared that the original will was deposited in the registry of the prerogative court of Canterbury, from whence it could not be removed to this state ; and that the copy thereof, annexed to the commission, was an exact copy of the original will on file. It also appeared that all the subscribing witnesses to the will were

; that, until their deaths, they all resided in England where the will was executed; and their hand writing as well as the hand writing of the testator to the original will on file, were duly proved. The commission depositions were returned, and delivered to the clerk of this court by the commissioner, personally. The only questions which arose in the case, were whether the will was duly proved, to entitle the authenticated copy thereof to be recorded as a will of real estate; and the effect of such proof. The court having taken time to examine the subject, delivered the following opinion.

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THE CHANCELLOR. The article of the revised statutes relative to wills of real estate, and the proof of them, (2 R. S. 56,) has made a distinction, as to the effect of the evidence, between those cases where one of the subscribing witnesses is alive and is examined personally, and the cases where the proof of the hand writing, where all the witnesses to the will are dead, or out of the jurisdiction of the court. In the first case, the record is evidence of the execution of the will, until repelled by contrary evidence. But in the latter case it can only be received in evidence in connection with other proof that the lands in controversy and devised by the will have been held under the will for the space of 20 years. (2 R. S. 58, § 15, 18.) An amendment adopted by the act of April, 1830, (3 R. S. app. 149, § 16,) authorizes the chancellor to issue a commission and take proof of the will either of real or personal estate where the subscribing witnesses reside abroad, or where the original will is retained in a foreign country. This statute does not, in express terms, authorize the proof of a will of real property executed out of the jurisdiction, where all the subscribing witnesses thereto reside abroad, but they are dead at the time of issuing the commission. It is evident, however, that the legislature intended to provide for such a case; as, by another pro-

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1881. vision of the statute, it is made necessary to have every
 In the matter of Hornby's will will of real estate recorded in the office of the surrogate,
 or of the register of this court, within four years after the
 death of the testator. (1 R. S. 748, § 3. 3. R. S. app.
 148, § 12.) And it must frequently happen that all the
 subscribing witnesses to the will are dead, even before
 the death of the testator. In such cases, where the will is
 impounded in a foreign tribunal, or the witnesses to
 prove the hand writing are out of state, the will cannot
 be proved before the surrogate. I think the sound con-
 struction of the several new provisions, introduced into
 the revised statutes by the 12th and 16th sections of the
 act of April, 1830, is, that the chancellor may issue a
 commission to prove a will of real or personal estate, in
 any case where, from the absence of the will or the non-
 residence of witnesses in this state, it cannot be proved in
 the usual manner before the surrogate, by producing the
 subscribing witnesses or by proving their hand writing.
 In the first case it is evident the hand writing can only
 be proved by an inspection of the will in the foreign
 tribunal; and where the will was executed abroad, and
 all the subscribing witnesses are dead, it will generally
 happen that the evidence of their hand writing can *only
 be obtained at the place where the will was executed. I
 must therefore declare that the evidence taken under this
 commission is sufficient to establish the validity of the
 original will, in consequence of the proof of the death of
 all the subscribing witnesses, and who resided out of this
 state at the execution of the will, and at their death; and
 the register must record the authenticated copy and the
 proofs or examinations annexed to the commission.

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As to the effect of the proof, it may not be necessary
 for the court to express an opinion at this time, as it will
 not be conclusive upon parties claiming in opposition to
 the will. But to prevent any misapprehension of my
 views on this subject, and, if possible, to prevent un-
 necessary litigation in relation to this question, I think it

per to give a construction of the statute as to this part
 he case. So far as the proof and recording of a will
 operate as a constructive notice to subsequent pur-
 chasers from the heir at law, or to protect the title of the
 issue, if the will is proved and recorded within the
 time prescribed by law, there seems to be no distinction
 in the statute between the effect of the proof of a will
 made by one or more of the subscribing witnesses, and
 where proof of hand writing is resorted to, for want
 of other evidence.

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It can hardly be supposed, however, that the framers
 of the law intended to give any greater force and effect
 to the proof of hand writing taken under a commission
 issued abroad, than is given to the same species of
 evidence when taken in the tribunals of our own state.
 As to the personal estate, the decree establishing the will
 in either case, conclusive, until opened or reversed by
 direct proceeding. The correctness of that decision
 is not to be inquired into collaterally. But it would be
 introducing a new principle into our law, to permit either
 a will or a deed to be proved, in a manner, *ex parte*, by
 other than a subscribing witness, and to give to the
 decree thereof the same force and validity as if the sub-
 scribing witnesses had proved its due execution. Hence,
 to include, notwithstanding the broad terms of the 66th
 section of the amendment, that the proofs taken under
 a commission can have no greater force or effect as
 evidence of the due execution of the will, than they
 would have had if they had been taken by the surrogate
 under the 16th section of the title of the revised statutes
 concerning wills and testaments, as originally passed.

It may also be proper to observe, that the power of
 issuing a commission to take the proof on a will abroad,
 is conferred on the chancellor alone, and
 is not to be exercised by a vice chancellor; and all the
 proceedings in such cases must be entered in the office of
 the register at Albany.

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J. HALLETT AND WIFE v. J. D. HALLETT AND OTHERS.

Where the intention of the court is to permit a party to produce and deliver over books and papers or any other thing, on his own ex parte affidavit merely, he is directed to produce and deliver the same on oath generally.

But where it is referred to a master to superintend the production or delivery, or the party is directed to produce and deliver on oath before a master, or under the direction of a master, all parties interested in the production or delivery may examine such party as to the fact, whether the order of the court has been fully and fairly complied with. In such cases the master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the party, if necessary.

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An order was made in this cause for the appointment of a receiver of the estate and effects of A. S. Hallett, deceased, in the hands of his executors; and directing them to deliver over to the receiver, under oath, *before master Depeyster*, the said estate and effects, with all books of account, papers, writings, securities and evidences of debt, belonging, or in any way appertaining to the same. The executors delivered over to the receivers certain books and papers, and made and delivered to the master the usual affidavits that they had delivered over all the estate and effects, books, papers, &c. in their custody, or within their power or control. The complainants then applied to the master for time to inspect the books and papers delivered, and for leave to examine the executors on written interrogatories or otherwise, if they should find the delivery unsatisfactory. The master being of opinion that the general affidavit was all that was necessary, and that he had no power to receive interrogatories, or to examine the *executors further, refused the application. The complainants thereupon obtained a certificate of the facts, and applied to the court for directions to the master to examine the defendants as to the delivery, &c.

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M. Hoffman, for the complainant.

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H. Bleecker, for the executors.

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THE CHANCELLOR. The master has mistaken the practice of the court under an order of this description. Where the intention of the court is to permit the party to produce or deliver over books and papers, or any other thing, on his own ex parte affidavit merely, he is directed generally "to produce and deliver the same on oath." But where it is referred to a master to superintend the production and delivery, or the party is directed to produce and deliver on oath, "before a master," or, "under the direction of a master," it is that all parties interested in the production or delivery may have an opportunity to examine as to the fact whether the order of the court is fully and fairly complied with. The proceedings in that case to ascertain the facts are substantially the same as on an order to produce books, papers, &c. before a master, on a reference to take an account. In this case the complainants were entitled to a reasonable time to inspect the books and papers produced and delivered over to the receiver; and, if they were not satisfied, they had a right to examine the executors on the subject, either orally or on written interrogatories, as the master should think proper. In this case it is the more important that the complainants should have the privilege of examining on interrogatories, as the affidavit of one of the executors is not positive, but merely as to his belief. Perhaps an examination might refresh his recollection, or at least satisfy the master that some other property or effects, books or papers, belonging or relating to the estate, were in his possession, or within his legal control. In *Gower v. Lady Baltinglass*, (Turn. and Russ. R. 195, note,) the defendant was compelled to answer interrogatories, notwithstanding she had brought in the trunk of writings, upon oath, in the usual manner. (See also *Hoffman's Master*, 11, and

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1851. *cases there cited.*) The examination in this case however
 Gouverneur is only to extend to the books, papers and effects which
 v. were actually in the possession, power or control of the
 The Mayor &c. executors at the time of making the order, or since; and
 of N. York. not to a general account of what they may be made liable
 for hereafter, in consequence of any previous neglect,
 misapplication of funds, or other misconduct. This is
 not the proper time to hold an inquisition as to these
 matters, although they will be proper subjects of inquiry
 after a decree for an account.

The master should have adjourned for a reasonable
 time, to enable the complainants to examine and see what
 papers and effects had been delivered to the receiver, and
 then to make the necessary inquiries of the executors, as
 to anything which they supposed was deficient, or had
 been withheld. The complainants must therefore have
 the order, as asked for in their notice, for leave to exam-
 ine the defendants, either on written interrogatories, or
 orally, as the master shall think proper. And the com-
 plainants' costs on this application are to abide the event
 of this suit; and to be taxed as costs in the cause, if costs
 shall be awarded to them.

GOUVERNEUR AND WIFE v. THE MAYOR, ALDERMEN AND
 COMMONALTY OF THE CITY OF NEW YORK, AND OTHERS.

The 186th section of the act of April, 1813, relating to the city of New
 York, does not authorize the collector to levy the assessment upon prop-
 erty found on the premises, unless it belongs to the person who was the
 owner or occupant of the premises at the time the assessment was made;
 and if it belongs to such owner or occupant, it is not necessary to dis-
 train it on the premises.

The property of a subsequent occupant cannot be sold under the warrant
 of the corporation, although he is bound by a covenant with the owner
 of the premises to pay the assessment.

Where there is a remedy given both against real and personal estate, for

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satisfaction of taxes and assessments, as a general rule, the remedy at the personal estate should be first exhausted, unless there is some vic and controlling equity to make it proper to proceed against the estate in the first instance.

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the lessee and occupant had covenanted to pay all taxes and assessments on the premises, and the corporation were informed thereof by the landlord, and requested to direct the assessment to be collected out of the personal estate of the lessee, which they refused to do, without reasonable grounds for such refusal, they were enjoined from proceeding against the property of the landlord, or from selling the real estate for the assessment.

There was an application for an injunction. The bill, among other things, that the father of Mrs. Gouverneur, one of the complainants, leased the Bank Coffee House, in the city of New York, to the defendant Niblo, for a term of five years, from the first of May, 1827; that the lessee covenanted to pay the rent, and all taxes and assessments whatsoever, ordinary and extraordinary, laid upon the premises during the term; that the father died in May, 1829, leaving Mrs. Gouverneur, his widow; that the premises descended to her as his heir; and that the defendant Doran was in the actual possession of the premises, as the assignee of the lease. The bill further stated that in May, 1830, an assessment of \$1000 for the widening of William-street, was imposed on the premises, which, by the terms of the lease, Niblo and his assigns were bound to pay; that the time for payment expired in July last; that the lessee and his assignee have refused to pay the assessment, although frequently requested so to do; and that the collector has called on the father of the complainants, and threatens to sell their estate in the premises for the payment of the assessment; that the personal property of Niblo and his assignee on the premises is more than sufficient to pay the amount of the assessment, and that the corporation might collect the assessment out of such personal property, if they were permitted so to do; but that they had refused to do so, although the complainants applied to them by petition to

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1831. collect their assessment before the property should be removed from the premises, or to discharge their lien on the property of the complainants. That Niblo the lessee, and Doran are men of slender circumstances as to property, and that the complainants are apprehensive they will lose the amount of the assessment, if they, by payment of the same, discharge the lien on the personal property on the premises, or if Niblo and Doran *are permitted to remove the said property from the said premises. The chancellor having directed notice of the application to be given to the defendants, the case was argued by

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F. Philipse, for the complainants, and

J. Tallmadge, for the defendants.

THE CHANCELLOR. There can be no doubt of the complainants' equitable claim to have the assessment collected out of the personal property of the person who was the lessee and occupant of the premises at the time of the confirmation of the report of the commissioners. And it is a general principle of equity that where the creditor has a remedy against two distinct funds, to enforce payment of his debt, and there is a plain and manifest equity in favor of the owner of one fund to have the debt collected from the other, the creditor shall resort to the fund which is properly chargeable with the payment as between the owners of both. This principle was asserted and enforced by Chancellor Sandford, in the case of *The York and Jersey Steamboat Ferry Company v. The Association of the Jersey Company*, (1 Hopk. R. 468.) It was doubted by Chancellor Kent, in *Hays v. Ward*, (4 John. Ch. R. 131,) whether the creditor could be compelled to exhaust his remedy against the fund which was equitably chargeable in the first instance. And in *Woolcocks v. Hart*, (1 Paige's R. 185,) it was subsequently decided, that if the remedy against that fund was either doubtful or diffi-

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cult, and the creditor was willing to give to the party standing in the place of a surety the full benefit of the lien on the first fund, the creditor would not be restrained from collecting his debt. Yet neither of those cases conflict with the equitable principle before stated.

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The complainants, in their petition presented to the common council, seem to suppose that the assessment is a specific lien, or that it may be enforced against the goods and chattels, either of the lessee or of his assigns, provided such goods or chattels are found on the premises. I have examined the 186th section of the statute, to which *I was referred on the argument of this motion, (2 R. L. 1813, p. 420,) but find nothing there which renders it necessary to distrain the property *on the premises*, or which gives any authority to levy on property found thereon unless it actually belongs to the person who was the occupant of the premises at the time the assessment was imposed. If the common council therefore have refused to issue their warrant to collect the assessment out of the personal property of the occupant, by which such assessment is unjustly charged upon the land, I do not know of any principle of equity that will authorize the court to restrain the tenant from removing from the premises property on which no person has yet acquired any specific or equitable lien. It is not even stated in the bill that Doran was the occupant of the premises at the time this assessment was made. If such was not the fact, although he may, as assignee of the lease, be liable on the covenants contained therein, yet his property cannot be seized on the warrant issued by the common council. So much of the application therefore as seeks to restrain the defendants Niblo and Doran from disposing of their property, or from removing the same from the premises, must be denied; and the temporary injunction heretofore issued is dissolved.

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It is a very general principle introduced into our laws that in cases of assessment and tax upon property, where

1831. there is a remedy given against both real and personal estate to collect the amount thereof, the remedy against the personalty shall be first exhausted; unless there is some specific and controlling equity to make it proper to proceed against the real estate in the first instance. In this case, after the corporation had distinct and legal notice of the complainants' equitable rights, it was their duty to endeavor to collect the assessment out of the property of the person who was the occupant under the lease, by assignment or otherwise, at the time the assessment was made. Although they have had distinct notice of this application, they have shown no excuse whatever for refusing to adopt a course which was so manifestly equitable, and which would probably have insured the payment of the assessment as soon, if not sooner than it could *have been collected in any other way. They must therefore be enjoined from collecting this assessment, either from the complainants, or by a sale of their property, until they have fully answered the bill; and until the further order of the court.

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VERPLANCK AND OTHERS v. THE MERCANTILE INSURANCE
COMPANY OF NEW YORK AND J. BARKER.

No persons are parties as defendants in a bill in chancery, except those against whom process is prayed, or who are specifically named and described as defendants in the bill.

Where there was no prayer of process against a corporation by its corporate name, but only against the officers thereof, and the corporation was not described in the bill as being a party thereto, *held*, that the corporation was not before the court as a party to the suit.

A receiver cannot be appointed to deprive the defendant of the possession of his property, *ex parte*, without giving him an opportunity to be heard in relation to his rights, except in very special cases, as where he is out of the jurisdiction of the court.

In cases where it is proper to appoint a receiver *ex parte*, the particular

circumstances which render such a summary proceeding necessary, should be distinctly stated in the bill or petition on which the application is founded.

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The receiver of a moneyed corporation, appointed under the 41st section of the title of the revised statutes which directs the manner of proceeding against corporations in law and equity, unless his powers are restricted by the order appointing him, is absolutely vested with all the property and effects of the corporation; and he may dispose thereof, and distribute the proceeds among the stockholders.

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But a receiver, appointed under the provisions of the 36th section, is a mere common law receiver, to protect the fund during litigation, and he has no powers except such as are conferred by the order appointing him.

THE bill in this cause was filed before the late vice chancellor of the first circuit. The complainants were stockholders of the Mercantile Insurance Company of New York. By their bill they alleged, among other things, that the directors of the company were under the influence and control of Jacob Barker, who was largely indebted to the company, and who represented himself to be insolvent. The bill also set forth various acts of the company, and of Jacob *Barker, which were alleged to be violations of the charter of the company, or to be injurious to the interests of the stockholders. Upon presenting the bill to the vice chancellor, and without any notice to the defendants or to the officers of the company, he granted an injunction, restraining the president, directors and other officers of the corporation, and the defendant Barker, from exercising any of the privileges or franchises granted by the charter, and from receiving or paying the debts of the company, or from interfering in any way with its property and effects. The vice chancellor, at the same time, made another order, appointing T. R. Smith receiver of the property and effects of the company; and directing the officers of the corporation immediately to assign and deliver over such property and effects, and all their books and papers, to the receiver. From these two orders the defendants appealed to the chancellor.

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1831. *D. Selden*, for appellants. It is not the province of this court to dissolve a corporation for every trifling violation of its charter. This was not its practice under its common law powers; and the statute law has made no change in this respect, (2 R. S. 463, 4, sect. 40.) The writ of injunction is issued only to an extent commensurate with the existing or apprehended injury, and which is necessary to protect the party applying for it; as, if a corporation should violate the section of its charter which prohibits the taking of usurious interest, the court would not prohibit the corporation from exercising all its powers, but would only restrain it from taking usury; thus applying a remedy adapted to the injury. But if the corporation should become insolvent, then the court would dissolve it; as a dissolution would then be the appropriate remedy for the protection of its creditors and stockholders. But in this case there is no allegation either in the complainants' bill or in their affidavits that the Mercantile Insurance Company is either insolvent or in debt. Is this then a case which calls for the interposition of the extraordinary powers of the court? An injunction restraining a corporation from exercising its franchises should never be granted, unless in cases of insolvency, or where there is evidence that the directors intend to waste the corporate fund.

[*440] The statute did *not contemplate that the court would go beyond this. The bill is also defective in not describing the corporate name with accuracy. This is indispensable in bills against corporations. If the least mistake is made in the description it is fatal. But the corporation is not a party to this suit, it not being named as defendant in the bill, and as process is not prayed against it. Where the complaint is that the directors of a corporation or trustees mismanage or waste the corporate or trust funds, the corporation or trust will not therefore be disturbed, but only the directors and the trustees will be suspended or removed. But in this case, if the bill contained proper allegations against the directors, it would not avail the com-

ts, as the prayer of process is not against them by individual names. A receiver is never appointed in cases where property belonging to others either is or there is danger that it will be. In this bill there are allegations to lay the foundation for the appointment of a receiver; the affidavits read on the part of the complainants cannot go beyond the case made by the bill. The affidavit of F. S. Allen must be rejected, as it was made before the complainants' solicitor.

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The court can in no case issue an injunction against a corporation, unless it is satisfied that its charter has been violated, or that the corporation is insolvent. (*The Attorney General v. The Bank of Chenango*, 1 Hopk. Ch. R. 174.) The belief of a party merely as to insolvency is not sufficient; he must state circumstances upon which his belief is founded.

The ground of the decision in the case of *The Attorney General v. The Bank of Columbia*, (1 Paige's Ch. R. 515,) was that notice had been given of the application to the bank and the bank not denying the allegations of the bill. In general, they were deemed as admitted. (*The Attorney General v. The Bank of Columbia*, 3 Wend. R. 307.)

(Sutherland, J.) There was no proof in this case to justify either the issuing of an injunction or the appointment of a receiver. There is a distinction between the application for an injunction and the appointment of a receiver. When the fund is not in danger a receiver is not appointed.

Wm. Bronson, (attorney general,) for the respondents. The Mercantile Insurance Company had violated several provisions of its charter, and of other acts binding on the company, and the injunction was therefore properly granted.

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The authority to grant the injunction is given by the 9th section of 2 R. S. 463. The bill alleges that the company has exercised banking powers in discounting notes, and has sold and purchased goods, both of

1881. which acts are violations of its charter. It was not necessary, under the 40th section of 2 R. S. 464, to set out particular instruments and the times and places in reference to these violations. It was sufficient to aver the fact without detailing the evidence of the facts. The 40th section of 2 R. S. 464, merely provides that due proof be made of the facts required in the 39th section to authorize the issuing of an injunction; and in the bill it is sufficient to aver that the acts prohibited in the 39th section have been committed. The Mercantile Insurance Company is also prohibited by its charter, except for the purpose of vesting its capital or funds, from buying and selling stock or any funded debt, or from dealing in the business of a stock or exchange broker. This provision has also been violated. The legislature having prescribed in what manner the corporation may vest its capital and funds, the corporation is not at liberty to depart from the mode prescribed. The corporation has also violated the 2d section of the 4th title of the 18th chapter of the 1st part of the revised statutes, (1 R. S. 601,) by buying in a part of its stock, which operates as a reduction of its capital. This section provides that it shall not be lawful for the directors of any incorporated company to divide, withdraw, or in any way to pay to the stockholders, or to any of them, any part of the capital stock of such company, or to reduce the said capital stock, without the consent of the legislature. A corporation cannot take a transfer of its stock, and keep it alive as such. The capital stock is the funds of the company. If the company has paid out such funds in the purchase of its stock, this extinguishes the stock, and amounts to a reduction of the capital. Where there is only a trifling violation of a charter, and neither the *public nor individuals are injured by it, the court probably would not interfere to dissolve the corporation; but if any injury resulted from such violation, the court will assume jurisdiction of the case.

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No person who has any real interest in this corporation,

sires its continuance. The whole of Barker's stock is hypothecated at its par value to the company. If the company should be dissolved, Barker would have no interest in the corporate funds. The stock of the company would not be worth par, as many large debts which are due to it are desperate. Can it be for the interest of those whose stock is not hypothecated, to continue the company, since the stock of those persons who have the control is hypothecated to the company for more than its value? The stockholders who are interested, in fact wish a dissolution of the company. The misnomer of the corporation can only be objected to by a plea in abatement. The granting of the injunction, and the appointment of a receiver in this case, was a proper exercise of the discretion vested in the vice chancellor.

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S. Sherwood, same side. The bill seeks for relief under the statute, as well as at the common law. A receiver is appointed wherever there is some existing evil. (*Middleton v. Dodwell*, 13 Ves. R. 266. *Lloyd v. Passingham*, id. 59. *Duckworth v. Trafford*, 18 id. 283. *Scott v. Fisher and others*, 4 Price's Exch. R. 346. *Vann v. Bartlett*, 2 Brown's Ch. Cas. 157. *Berney v. Sewall*, 1 Jac. Walk. Ch. R. 627. Hovendon's Sup. to Ves. 500, n. 3.) From these authorities it appears that the court appoints a receiver whenever the fund is in danger, upon affidavit before answer, and without notice to the opposite party. If the court then does interfere, without giving notice to the adverse party, the only question remaining is, is the case sufficiently made out to authorize the appointment of a receiver, without notice to the persons having possession of the property? The case shows that the business of several companies has been transacted together, and all under the direction of J. Barker; that the whole is mixed up and in confusion; that J. Barker is insolvent and largely in debt to this company; and strong reasons are shown for supposing that this company is on the way to

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1881. ruin. In the city of New York receivers have generally
 Verplanck been appointed without notice. (*Boyd v. Murray*, 3
 v. John. Ch. R. 48.) The Mercantile Insurance Company
 Mercantile Ins Co. of N. Y. is not authorized to buy and sell goods, &c., or to engage
 in the trade or business of an exchange or stock broker,
 or in the purchase or sale of any stock or funded debt, &c.
 (Laws of N. Y. of 1818, p. 92, sec. 10.) Dealing in stocks
 is hazardous. The court will not be inclined to extend
 the powers of the company in this respect. The company
 has no authority to purchase or hold local bank and insur-
 ance stock. We show a strong case of misapplication of
 funds, besides several violations of the charter.

B. F. Butler, in reply. The court of chancery, before
 the statute of 1825, (Laws of N. Y. sess. 48, p. 448), has
 no power to dissolve a corporation. So far as the bill is
 filed against the corporation, the case must be brought
 within the provisions of the statute, there being no
 remedy at common law. (2 Kent's Com. 244, 252.) The
 court, by virtue of its general jurisdiction, may interfere
 against directors as trustees to protect the stockholders,
 and might, with this view, appoint a receiver; but then,
 to authorize it to do this, the bill must be filed against
 the directors by name. (*Ogden v. Kip*, 6 John. Ch. R.
 180.) This bill is defective in not stating correctly the
 style and name of the corporation. This was necessary.
 (*Bank of Utica v. Smally*, 2 Cowen's R. 770.) The affi-
 davit taken before the complainants' solicitor cannot be
 read. (In the matter of Hogan, 3 Atk. R. 813.) The
 name of the solicitor and commissioner being the same,
 the presumption is that it is the same person; and the
onus probandi that they are not the same is on the other
 side. There is principle involved in this objection, as the
 legislature have prohibited a person from acting as soli-
 citor or counsel and as master in the same suit. The
 charter of the Mercantile Insurance Company is a peculiar
 one. It contains two uncommon provisions; the one fix-

the number of directors *at 21, and the other requiring
 a director to hold 30 shares of stock.
 such an extraordinary exercise of power as that in this
 , against directors having such an extent of interest,
 t least of very uncommon occurrence. The names of
 directors are not given in the bill. There is no charge
 nsolvency against them. And yet an injunction has
 n granted and a receiver appointed, without notice to
 company or the directors, upon the alleged ground
 t it would have been unsafe to have given such notice.
 hough the order was for an injunction against the
 actors, yet, if it affects the corporation, the latter can
 eal, and upon the appeal, may show that the order
 s erroneous. The order is erroneous, as there is no
 yer in the bill for an injunction against the directors.
 e order was improper also, as the court had no power,
 er under the statute or at common law, to grant an in-
 action against the directors, if there was no prayer in
 bill for this writ against the corporation. And to
 horize a prayer for the issuing of an injunction against
 directors, they must be named in the bill. If a re-
 ver is prayed for in the bill, it is of the property and
 acts of the company; and the order for a receiver, as
 inst the company, is erroneous, as the company is not
 arty to the suit, it not being named as such in the bill,
 l no subpoena being prayed for against it, which are
 tests which determine who are the parties to the suit.
 damages should be awarded in consequence of this
 er, they would be awarded to the directors and not to
 company. The corporation is not called upon in the
 to answer, nor is there a charge of combination
 inst it. The bill requires the defendants to answer
 on their corporal oaths. This is not the usual prayer
 inst corporations. The prayer is that they answer
 ler their common seal. There was evidently no inten-
 on the part of the complainants that the corporation
 uld answer. The objection here is not one of mis-

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nomer merely, but also that the complainants, having the true name of the corporation before them, pray a subpoena only against the directors. Accuracy in giving the name of a corporation is important, as there are many names of corporations almost identical. *As the complainants ask for the interposition of the highest power of the court, a knowledge of the extent of their interest in the corporation is necessary to a proper exercise of the discretion vested in the court in such cases. Whether the complainants own 9000 shares, or only one share, would make a material difference in the exercise of this discretion; but as the bill is silent on the subject of the amount of stock held by the complainants, we have the right to contend that they hold only one share, as the presumption is that they framed their bill as favorably to themselves as their case would admit. The complainants do not charge in their bill that the company is insolvent; nor even that they believe J. Barker is insolvent. All the allegations in the bill are founded upon information and belief. The complainants are not in a situation to acquire the best information; they reside in different counties, and two of them are females. Not one of the large stockholders in the city of New York has united as complainant. These circumstances should have been considered by the vice chancellor, and should have prevailed with him not to grant an injunction, or appoint a receiver without notice to the adverse party. Here was clearly not a sound exercise of the discretion vested in the court. And here was a delay of 20 days, from the time the bill was sworn to, to the time the orders for an injunction and receiver were granted. Why this delay, if the stock and funds of this company were in such imminent danger as is now pretended? If notice had been given to the adverse party, all these considerations would have been pressed upon the vice chancellor.

If it had been intended that the court should interfere by virtue of its general jurisdiction against the directors

trustees, the directors should have been brought before the court by name. The corporation is not a trustee, as the stockholders constitute the corporation; and the absurdity would then exist of the corporation suing itself. The prayer for relief follows, and is in conjunction with the prayer for a receiver. Where there is a prayer for general, and also for particular relief, no relief can be granted under the prayer for general, unless it is consistent with the prayer for particular relief, as the former is ancillary to the latter. The appointment of a receiver of a corporation is a disfranchisement of its officers, and works a dissolution of the corporation. This was not authorized by the prayer of the bill; it is the prayer which furnishes the test, as to the ground upon which the bill is filed. In the case of *The Attorney General v. The Utica Insurance Company*, (2 John. Ch. R. 371,) the attorney general filed an information against the Utica Insurance Company, which prayed for an injunction to prohibit the company from exercising banking powers. The chancellor decided that he had no power by virtue of his general jurisdiction to grant the injunction. The law so remained until the act of 1825 (sess. 48, Laws of N. Y. p. 448) was passed; but this act was only intended to reach cases of insolvency in corporations. Under this act the corporate funds must be in danger to authorize the interference of the court; and this, whether the bill be filed by the attorney general, a creditor, or a stockholder. The evident object of this act was to protect and preserve the corporate funds for the creditors and stockholders. The object of all laws is to prevent the mischief intended to be remedied, with as little injury to others as the circumstances will admit. Where a receiver is appointed under the 39th section, (2 R. S. 463,) the authority with which he is vested under the third article of the same title amounts to a judgment of forfeiture against the corporation, as perfect and effectual as if given upon an information in the nature of a quo warranto. This result

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1831. could not have been the intention of the legislature. The
 Verplanck attorney general might have filed his bill either under the
 v. 31st or 32d sections, (2 R. S. 462, 3;) and a creditor or
 Mercantile Ins. an officer of the corporation might have filed a bill under
 Co. of N. Y. the 33d section, which is a new section, and extends the
 jurisdiction of the court. The 33d section is extremely
 remedial in its provisions; but in this case the attorney
 general has not filed his bill under the 31st section, nor
 was the bill filed under the 33d section; under either of
 which sections, perfect remedies could have been obtained
 for the alleged mischief, without working the ruin *of
 the corporation. But the most severe remedy is resorted
 to; one which can only be obtained by a destruction of
 the corporation. This leads to an inquiry into the motives
 of the complainants. They say they fear the corporate
 funds are in danger; but if they are, why adopt the
 remedy which goes beyond the evil apprehended! Under
 the 39th section the bill might have been filed for the
 causes there specified. But the bill is so ambiguously
 and artfully drawn, and so involved, that if you construe
 the allegations therein of forfeiture, by the rule *reddenda
 singula et singulis*, it will be found that some one or other
 of the several corporations and defendants named in the
 bill could exercise some one or other of the powers, which
 it is contended are not possessed by the Mercantile In-
 surance Company. There is no specific charge, *eo nomine*,
 in the bill against this company of any single violation
 of its charter. Great certainty and precision are always
 required in making allegations of this kind against cor-
 porations. (*The Attorney General v. The Bank of
 Chenango*, 1 Hopk. 598. *The Attorney General v. Bank
 of Columbia*, 1 Paige's R. 515. *Same held in Court of
 Errors*.) The complainant must allege and set out the
 circumstances so as to show the court there has been a
 violation of the charter; at least, the bill must distinctly
 charge that the corporation has violated its charter, and
 specify particularly wherein, so as fully to apprise the ad-

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verse party of the particular violations for which the bill was filed. The proofs in support of the bill must go to the facts and circumstances which constitute the violations. An allegation that the complainant believes the facts and circumstances charged as violations of the charter to be true, is not sufficient; the court must have, under the 39th section of the statute, due proof of the facts. Upon the trial of an information, proof that the corporation did, on a particular day, violate its charter, would not be sufficient, but the witness must state the particular acts, and the court will judge whether they amount to a violation of the charter or not. It is not sufficient that the witness is satisfied the charter has been violated; the court must also be satisfied. The other charges of the violation of the charter contained in the bill, and not before adverted to, are not brought home to *the present directors of the Mercantile Insurance Company. The court cannot discreetly exercise the power of appointing a receiver, unless the present officers of the corporation are unfit to manage its affairs. Suppose the present officers are pure and faithful, and the violations of the charter were committed during the management of their predecessors, would the court take the management out of their hands? Certainly they would be more fit and competent to perform the duties of directors than a stranger; and by permitting them to continue as directors, the expense of commissions would be saved. This information was necessary for the court, before it could discreetly exercise its power of appointing a receiver; but the affidavits and proofs do not sustain the allegations in the bill.

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The Mercantile Insurance Company can take securities upon the sale of real estate, received in payment of debts, by force of the words, "or other personal property," (Laws of 1818, sec. 10, p. 92.) It can hold stock, provided it is for the purpose of investing any part of its capital stock or funds, or of the proceeds of the sale of real estate; but

1831. even if it were doubtful whether the company had the power, there is a decisive objection to the interference of the court by injunction, and the appointment of a receiver, as the affidavits do not prove that the complainants have engaged in the business of exchange or stock brokers. A broker is one who stands between the buyer and seller. If he owns the stock which he buys and sells, he is not a broker. Here, the company purchased stock for itself, and not for others. The influence of such a proceeding upon the prosperity of the company is a different question from that of forfeiture. There is no prohibition against this company's buying in its own stock, and thereby reducing its capital. The act of 1825 is the first statute which contains this prohibition; but it is questionable whether this law applies to previous corporations. The fact of the Mercantile Insurance Company's buying in its own stock is, however, immaterial in this case, as it is not made a cause of forfeiture in the bill. There was in fact no reduction of capital; and as creditors have not been injured, there can be no ground of complaint; and if there are still funds sufficient to satisfy the creditors of the corporation, there is no ground for the interference of the court.

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THE CHANCELLOR. I shall not attempt to examine or express any opinion upon the merits of this case as stated in the complainants' bill; because upon examination of the objections which have been raised as to the form and regularity of the proceedings before the vice chancellor, I find those objections insurmountable.

The first objection is, that although the order appointing a receiver purports to have been entered in a suit against "The Mercantile Insurance Company of New York," under which order the appellants have been deprived of the possession of their property, they were not in fact parties defendant in the bill; as the prayer of process was only against the officers of the corporation

name of the corporation is as before stated. But the error for process is that the subpoena may be directed to the president and directors of the said company. This is undoubtedly owing to the mistake of the solicitor who drew the bill, and who probably did not intend to serve the president or directors, but only the corporation of Jacob Barker, parties to the suit. The same mistake was made as to the prayer for the injunction, and is also contained in the order granting the injunction; so that the injunction, in fact, is neither against the corporation nor its officers by their proper names. As this objection is merely formal, I should not feel disposed to insist on it, if the difficulty can be obviated by an amendment. As it now stands, it may deprive the appellants of a substantial right; and it is somewhat doubtful whether they have the power to answer this bill. It does not pray process against the corporation, nor calls on the officers to answer; for, by another singular oversight of the solicitor, that part of the bill merely prays that the confederates may answer upon their corporal oaths; whereas the officers of the corporation, and not the confederates, are charged with confederating; and they only answer by putting in their answer on their oaths. It is well established that no persons are parties as defendants in a bill in equity, except those against whom process is prayed, and who are specifically named and described as defendants in the bill. (1 Marsh. Kent. R. 594. 2 John Ch. R. 2 Dicken's R. 707.) In *Elmendorf v. Delancy*, (1 John Ch. R. 555,) Chancellor Sandford says: "When it is uncertain who are complainants, or who are the persons called to answer, the suit is fundamentally defective; and if the parties are not clearly designated, it is the fault of the person who institutes the suit." In answer to this objection, it is suggested by the respondents' counsel that it is a misnomer of the corporation, and can only be taken advantage of by plea in abatement. It cannot, however, be considered a misnomer. The name of the corporation is

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1831. corporation and the substance of the charter are distinctly stated in the commencement of the bill, and the process is then prayed against the officers only. Besides, the appellants never had an opportunity to make the objection by plea in abatement, or in any other form. As the true name of the corporation was stated, the objection appeared on the face of the bill, and no plea was necessary to bring the fact to the notice of the court.

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Another fatal objection to the regularity of these proceedings is, that the appellants were deprived of the possession of their property, and divested of all their corporate rights, without having an opportunity of being heard, and without any sufficient cause for such a summary proceeding. By the settled practice of the court in ordinary suits, a receiver cannot be appointed, ex parte, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or cannot be found; or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of property. Formerly it was never done until after answer. (*Vann v. Barnett*, 2 Bro. Ch. Cas. 157. *Maguire v. Allen*, 1 Ball & Beat. 75. *Tanfield v. Irvine*, 2 Russ. R. 149. *Coward v. Chadwick*, id. 150, note. *People v. Norton*, 1 Paige, 17.) In every case where the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render *such a summary proceeding proper, should be set forth in the bill or petition on which such application is founded. Oglevie's affidavit in this case, that he was satisfied of the necessity of such a proceeding, was not sufficient. He should have stated the facts on which his opinion was founded, to enable the court to judge of its correctness. There are 21 directors of this company, each of whom, by the provisions of the

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charter, must be a resident of this state, and an owner of \$2,500 of the stock. It is not alleged that a majority, or even any considerable number of these directors were insolvent or destitute of character. And it would be felony in any of the individual officers to embezzle or spirit away the property of the institution, without the consent of the board of directors. (2 R. S. 678, § 59.) The court ought therefore to have something more than the mere opinion of a witness, however respectable, to induce it to suppose such a direction would subject themselves to punishment for the violation of an order of the court, or that the officers of the company would be guilty of felony, by embezzling the property without the consent of the directors, if the usual course of an order to show cause at a short day had been taken, and a temporary injunction in the mean time granted. That practice was adopted by the chancellor in the case of *The Franklin Bank*, (1 Paige's R. 85,) and the same course has been pursued by him in all subsequent cases. This should have been considered by the vice chancellor as the correct practice, unless special circumstances rendered a different course of proceeding proper.

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There is another reason which rendered the *ex parte* proceeding in this case still more objectionable. This is a bill filed by stockholders to wind up the concerns of the corporation, on the ground of an alleged violation of the charter. In this respect it differs materially from the bills which have frequently been exhibited in this court by stockholders, against the individual directors of the company, to restrain them from violating their trust. And it can therefore only be sustained as a statutory proceeding under the 39th section of that title of the revised statutes which directs the manner of proceeding against corporations at law and in equity. (2 R. S. 463.) That *is the only provision I have been able to find which authorizes a proceeding by a *stockholder* to enforce forfeiture of the franchises of the corporation, and to compel a dis-

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1881. Verplanck v. Mercantile Ins. Co. of N. Y. tribution of the funds. Although the 41st section authorizes the court in any stage of the proceedings, upon an application under that provision of the statute, to appoint a receiver of the property and effects of the corporation, it could not have been supposed by the legislature that the court would appoint such receiver, with the powers conferred upon him by the next section, without any notice of the application to the corporation or its officers. The receiver, appointed under that part of the revised statutes, unless his powers are restricted and controlled by the order of the court, is absolutely vested with all the property and effects of the corporation; and he has full power to sell and dispose of the whole, at his discretion, and to distribute the proceeds among the stockholders, after paying the debts owing by the company. It is in effect a final order in the cause; and unless altered or revoked, operates as a virtual dissolution of the corporation. It is not a common law receivership to protect the fund pending the litigation; but the receiver is a statutory assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. (2 R. S. 464, § 42; 469, § 67, &c.) It would therefore be a violation of one of the fundamental principles of justice, to appoint such a receiver, without any restriction of his powers, on an ex parte application; and thus to condemn and deprive a company of its chartered privileges unheard. A different kind of receivership is authorized by the 36th section of the same title, on the application of a judgment creditor. (2 R. S. 463.) That is the same kind of receiver which was authorized by the 17th section of the act of 1825, on the application of the attorney general, or of any creditor of the corporation. (Laws of 1825, p. 453.) Those were strictly common law receivers; such as are usually appointed by this court in suits between party and party, and to protect the fund during the litigation. They have no powers except such as are

conferred upon them by the order for their appointment, and the course and practice of the court.

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*The vice chancellor erred in granting a general injunction on this bill, and in appointing a receiver, without notice to the corporation; both orders must therefore be reversed and vacated, with costs on the appeal therefrom, to be paid by the respondents, to the solicitor of the appellants. The proceedings must be remitted back to the vice chancellor of the first circuit, with permission to the complainants to apply to him for leave to amend their bill, so as to make the corporation defendants therein, and otherwise as they may be advised, upon due notice of such application to the solicitors of the appellants and of Jacob Barker. Upon such amendment being allowed and made, an order may be entered, directing the defendants to show cause before the vice chancellor, at such time and upon such notice as he shall direct, why a general or other injunction should not be granted, and a receiver be appointed, either with the general powers conferred by the statute, or subject to such restrictions as to the vice chancellor shall seem proper; and that in the mean time a temporary injunction issue, restraining the defendants and the officers of the company from buying or selling any stocks, or doing any act in violation of the charter of the company, and from doing such other acts as may, in the opinion of the vice chancellor, be proper to restrain them from doing, pending the application before him.

Thomas R. Smith, the receiver appointed in this cause by the vice chancellor, must also forthwith deliver over to the assistant register of this court, as clerk of the vice chancellor of the first circuit, all the books and vouchers, moneys, property and effects of the corporation, which have come to his hands, or to the hands of any of his attorneys, servants or agents; and the assistant register must deposit the same in the bank of the Manhattan Company, subject to the further order and direction of the

1831. vice chancellor. And they are to be delivered up to the
 Verplanck officers of the corporation, unless the complainants shall
 v. procure their bill to be amended, and obtain an order to
 Mercantile Ins. show cause, &c., within three weeks after notice of this
 Co. of N. Y. decision. Or, if the directors of the corporation, or the
 major part of them, shall give sufficient security, to the
 satisfaction of the vice chancellor, to abide the final order
 *and decree which may be made in this cause, and to
 account for the property and effects of the company as
 this court shall direct, the books, property and effects, the
 moneys of the corporation in the hands of the receiver,
 are to be immediately restored to such directors, or to
 their agents or servants, for the use of the company. [1]

[1] See Waterman's Am. Ch. Dig. tit. RECEIVER. A receiver cannot be compelled to account and show his books to a party in the suit; he is to account to the court only. *Musgrove v. Nash*, 3 Edw. Ch. Rep. 173. A receiver in chancery has no authority, by virtue of his appointment, to sue in his own name, on a contract not made or assigned to him. *Ingersoll v. Cooper*, 5 Blackford's Rep. 426. The rule which prohibits a receiver from employing the solicitor of either of the parties to the suit in which he is appointed receiver, is intended to protect the rights of the parties to such suit. And, if such parties make no objection, the receiver may employ the solicitor of either, to aid him in the discharge of his trust. *Warren v. Sprague*, 11 Paige, 200. A mere stranger to the suit has no right to object to the employment, by the receiver, of the solicitor of one of the parties to the original suit, to institute a new suit against such stranger. *Ib.* Where a receiver of partnership effects has been appointed, but he takes no goods or property which the landlord could restrain, and does not hold the possession of the premises, such landlord has no right to payment of rent in preference to other creditors. *In the matter of Brown*, 3 Edw. Ch. Rep. 384. Where the protection of the rights of a defendant requires the continuance of the receiver, the court will not grant a discharge, although the suit is at an end. But it will require the defendant thus protected, to file a bill forthwith, to settle his rights. *Whitewide v. Pendergast*, 2 Barb. Ch. Rep. 471. (Vide 2 Moll. Rep. 497; 1 Sch. and Let. 296.) Where a receiver had the supposed value of sixty thousand dollars of property in his power, and the amount which was likely to be required to satisfy the demands was only about one thousand dollars, the court restrained him from making sale by auction of the whole mass. *Wardell v. Leavenworth*, 3 Edw. Ch. Rep. 244. Where it appears, upon a reference before a master, that a judgment debtor has the use of furniture, but the

right under a judgment against him, and an agent (a relation) with the debtor, is to protect the possession for the buyer, the agent, where such agent and buyer are not before the court, directly deliver the furniture to a receiver. And his refusal to do so is considered more as an appeal to the court, than as a matter of concern. *Ford*, 3 Edw. Ch. Rep. 441. Where a receiver is put in possession of furniture and removes it, the landlord has no right to it, nor will he have a preference out of its avails. *Martin* v. *Ch. Rep.* 580. It is the duty of a receiver to keep the trust moneys separate and distinct from his own moneys. And if deposited for safe keeping, the money should be deposited to a separate account in his name, as receiver, to the end that the fund can at all times be traced and identified. *The Utica Insurance Company v. Lynch and Co.*, 520. If a receiver loans out any part of the moneys to his hands, as such receiver, even temporarily, to his friends, it is a breach of trust. *Ib.* A receiver represents the interests in the property, which interests are often various and sometimes involved in doubt. It is his duty to protect the interests vested to him, to the best of his ability, for all those interests, which are controlled by the representatives of any one of them. *Ib.* When a receiver takes possession of goods under the express directions of the master, or where the master has decided that the goods are in the possession of the receiver, and has directed the defendant to deliver possession to the receiver, the court will assume the exclusive control of the subject, and will not suffer the receiver to be sued at law for such goods. *Parker v. Browning*, 8 Paige, 388. (Vide 2 Edw. Ch. Rep. 76, § 891.) Where a complaint is made against an officer of the court for misconduct, while acting under color of authority, the court may either itself take cognizance of the complaint, or may allow the parties to try the matter before a jury, or may allow the party aggrieved his suit at law for the alleged injury. *Ib.* (Vide 2 Myl. Ch. Rep. 101.) A receiver is under no obligation to attempt to take possession of a third person, or even from the defendant himself, without an express order of the court directing him to do so. A receiver, or party who wishes an actual delivery of the property, could call upon the master to decide what property, legally or equitably, is due to the defendant, and to which the receiver is entitled. If the master of the court, is in the possession of the defendant, or under his control. And it is the duty of the master to direct the receiver to deliver to the receiver the actual possession of all such property, and to assist him to take possession thereof. If the defendant is dissatisfied with the decision of the master, he must apply to the court to review the decision. He will be compelled, by process of contempt, to comply with the directions. *Ib.* Where the property is in the possession of a third person, who claims the right to retain it, the receiver must either

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proceed by suit against him, or the complainant must make him a party to his suit and apply to have the receivership extended to the property in his hands; so that an order may be made for its delivery and may be enforced by process of contempt. *Ib.* Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect such possession, not only against violence, but also against suits at law. But if the property is in the possession of a third person, under a claim of title, the court will not protect the officer who attempts, by violence, to obtain possession, any further than the law will protect him; his general authority being unquestioned. *Ib.* A defendant in a creditor's bill is not in contempt for neglecting to deliver over property to the receiver, where such property is claimed to be in the possession of, and to belong to, a third person, unless the master has decided that such property belongs to, and is under the control of the defendant. *Cassiter v. Simons*, 8 Paige, 273. Where the defendant is directed to assign and deliver over his property to a receiver, under the direction of a master, if the complainant wishes to have an actual delivery of property which he supposes to belong to the defendant, but which the latter insists belonging to another person, he must apply to the master to decide what property is under the defendant's control, and to make an order directing the defendant to deliver over the property which shall be decided to be under his control, before he can bring such defendant into contempt for disobedience of the order of the court. *Ib.* If goods of the judgment debtor have been fraudulently assigned, and the fraudulent assignee is made a party to the suit in chancery against such debtor, and is irresponsible, the proper course, where such assignee claims to be in possession of the property, is to have the receivership extended to him; and to obtain an order that he, as well as the judgment debtor, deliver over the property in controversy to the receiver. *Ib.*

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A feme covert cannot file a bill against her husband in her own name, except in the single case of a bill to obtain a divorce on the ground of adultery.

A bill to obtain a separation merely must be filed in the name of the friend of the wife; and if it is not so filed, the defendant may demur. No allowance for costs or alimony can be made to the wife, if it appears upon the face of her bill that it is improperly filed, and that she obtain no decree thereon.

Where the wife has no separate estate, no decree can be made again in favor of her husband for costs.

bill in this case was filed against the husband for a
on, on the alleged ground of cruel treatment. The
nt demurred to the bill on account of its having
hibited by the wife in person, without a next
as required by the 163d rule of this court. This
n was urged in opposition to an application to the
chancellor of the first circuit for an allowance to
by way of alimony. He overruled the objection,
ered the defendant to pay her one hundred dollars;
rred it to a master, to report what further sum he
advance towards the expenses of the suit, and to
ekly or monthly allowance, by way of alimony,
the litigation. From this decision the husband
l to the Chancellor.

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Timan, for the appellant. The complainant has
: bill in this suit alone, and not by any person as
friend, nor is any person made responsible for the
ich may be awarded to the defendant. This is a
jection to the bill; and the defendant may take
ge of it by demurrer. Cooper, in his treatise on
leading, page 163, says: "If a married woman
a bill without *naming a next friend, and the
ty appears on the face of the bill, the defendant
e advantage of it on demurrer."

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ractice of this court, as it has existed for years,
mentioned by the 163d rule of this court, provides
o bill shall be filed in the name of a feme covert
a decree for a separation or limited divorce,
e suit is prosecuted by some responsible person
xt friend of the complainant who shall be respon-
such costs as may be awarded by the court." A
h is filed irregularly, and contrary to the plain
practice of the court, cannot furnish a substantial
on for any order.

thorities above mentioned were cited on the ar-
before the vice chancellor. By the common law,

1831. if a wife improperly abandons her husband, and refuses to return to his house, he is not liable for her support. The defendant's affidavit, and that of a disinterested person show that the complainant's absence is owing to her own fault, consequently she ought not to be allowed to absorb the residue of her husband's slender means in the manner which she proposes, which will operate as a special premium for her abandonment of duty and gross misconduct. There is no allegation in the bill that the children have been, or will be neglected or ill treated by their father, and the mother should not be enabled, through the intervention of this court, to compel him to support them in a manner too expensive for his means. If he refuses to support them, it is (in this stage of the proceedings) a subject proper for the attention of the overseers of the poor, rather than of this court. The vice chancellor's order sweeps away the entire means of the defendant, and then refers it to a master, to say how much more he shall give. The latter part of the order seems unnecessary, if not oppressive. The defendant is prohibited by the injunction (which, at the argument, was admitted to be according to the prayer of the bill) from disposing of any part of his estate, and yet the order requires him to pay one hundred dollars. He manifestly cannot do this without a breach of the injunction, and a contempt of the court.

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*The only serious question in the case is, how is the defendant to be paid his costs? From his wife he cannot obtain them. If a solicitor files a bill for a non resident complainant without security for costs first given, he is personally responsible; although in such a case the defendant's costs might probably be obtained from the complainant. In this case it is impossible for the solicitor for the defendant to obtain costs from the complainant. He should therefore be entitled to recover them from the complainant's solicitor, upon the ground that the bill was

regularly, and against the express prohibition of the court.

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Warner, for the respondent. The appeal is from the order which gives the wife and her three children (who have been more than one year without assistance from the husband and father) the \$100 towards their necessary maintenance, and to a master to inquire what further allowance should be made. Does such a case admit a question? The defendant's counsel rely on a supposed formal irregularity in the draft of the bill, inasmuch as it is not filed in the name of a next friend. 1. Suppose, then, the bill is defective in this respect, to be amended; is that a reason why the wife and children should be left to perish? Will the court be entertained for a moment? 2. Again, the defendant has demurred to the bill for the cause above stated, to respecting its form. Will the court countenance the present attempt to anticipate the argument of demurrer? Will they not leave the party to try the merits in the way he has selected for the purpose? But the court has decided that the pendency of a demurrer is no bar to an order for maintaining the wife in the mean time. Whenever the demurrer shall be heard, I shall give judgment with great respect, that the bill is right, at least as to the demurrer; and that if any security for costs is demanded, a special motion is the proper means of obtaining it. 3. But the defendant's affidavits represent that the wife has been too long to blame; that the husband never furnished her with maintenance, till the month of April, 1830; that her means are small, &c. As to the defendant's bill, he admits a salary of *\$300 a year; and we ask, at this instance, \$100 only, and after that, an inquiry into the merits. Will the court be wrong? And as to the rest of the matters of demurrer, they belong to the merits of the controversy, and should be discussed on pleadings and proofs at the

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1881. hearings. Meantime, however, the mother and her infant
 Wood children must live.

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THE CHANCELLOR. A feme covert has no right to file a bill against her husband without the interposition of a next friend, who will be answerable for the costs, in case the suit is instituted without any reasonable cause.^(a) If the objection appears on the face of the bill, it is a good cause of demurrer; and the objection goes to the whole bill. (Willis' Eq. Pl. 5, n. s. Mitford, 153. Cooper, 163.) The statute has authorized her, in a suit for a divorce which is to dissolve the marriage contract, to institute the same in her own name. But by the revised statutes this power is only given under the article which relates to divorces on the ground of adultery. (2 R. S. 144, art. 3, § 39.) This section, which authorizes the defendant to answer without oath, was never intended to apply to bills filed under the second or fourth articles. Nor was the 163d rule intended to create any new disqualification, but merely to declare the existing law of the court; and to call the attention of the bar to the distinction which had been made by the revised statutes. As it appeared on the face of the proceedings that this bill was irregularly and improperly filed in the name of the wife alone, the defendant ought not to have been subjected either to costs or expense, until the irregularity was corrected by an amendment of the bill or otherwise. In the case of *Mix v. Mix*, (1 John. Ch. R. 108,) it was at least doubtful whether the demurrer could be sustained; and for that reason a small allowance was made for the wife until that question could be decided. Here the bill is filed not only against the settled law of the court, but in direct violation of one of its standing rules. It would therefore be unreasonable to compel the defendant to furnish the means of carrying on a suit which the court must see cannot be sustained.

(a) See Lube's Equity Pleadings, 25.

*The order of the vice chancellor must therefore be reversed ; but without prejudice to the right of the complainant to renew the application, if her bill shall be amended by inserting the name of a responsible person as her next friend. There being no evidence that the wife has any separate estate, no costs can be awarded against her on this appeal. The appellant's counsel ask for costs, to be paid by the solicitor, but I know of no principle which can authorize an appellate court to charge the solicitor of the respondent with costs produced by the mistake of the judge whose decision is reversed.

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On an application for a retaxation, where the pleadings were before the taxing officer, the court will presume the number of folios were correctly taxed, unless there is an affidavit of a mistake in that respect.

If counsel, other than the solicitor, is actually employed in the cause, retaining fees, both for solicitor and counsel, are taxable, although the name of the solicitor only is subscribed to the pleadings as counsel.

Instructions to search for judgments, &c., are only taxable in mortgage cases, and others of that description, where, by the practice of the court, it is necessary to make all the incumbrancers parties to the suit.

Where deeds and other writings or parts thereof are incorporated into pleadings, they cannot be charged as a part of the draft of such proceedings.

A copy of the subpoena to annex to the affidavit of service is unnecessary and not taxable; the original subpoena should be annexed.

Three folios are allowed for the draft and engrossments of subpoenas, for witnesses; and two for the draft and copies of subpoena tickets.

Twelve and a half cents is the proper allowance for serving a subpoena on a witness in chancery.

A written request to the register to enter an order is in the nature of a precept, and cannot be taxed under the revised statutes.

Where a witness is directed to be examined on written interrogatories, an engrossed copy of the interrogatories to be filed with the testimony, is taxable.

It is not necessary, where the copy of a pleading is served on the adverse

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party, to give him notice that it is a copy; and no allowance can be made on taxation for such notice.

All charges for notices not required by the rules and practice of the court should be rejected by the taxing officers as useless and unnecessary services.

An affidavit of serving a notice of the order to answer is taxable, if actually made, although it is afterwards rendered unnecessary by the putting in of the answer.

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*But an affidavit of service of a notice of the examination of a witness is not taxable, unless it becomes necessary to make and use such an affidavit on some special application to the court.

Where the examination of several witnesses is noticed for the same time, only one notice is necessary; and a notice of the examination of a witness, for the examiner, is not taxable.

Where the whole travel of a witness in going and returning is less than fifteen miles no allowance for travel can be made, unless it appears that he was obliged to come so early, or was detained so late, that he could not come and return on the day of his attendance. If the whole distance both ways is over fifteen miles and under thirty, one day should be allowed for travel; and if over fifteen miles each way, one day should be allowed for the witness to come, and one to return, independent of the time he is detained for examination.

Charges for disbursements to witnesses, beyond the amount of their per diem allowance, are not taxable against the adverse party.

Where travelling fees are claimed, the affidavit should state the probable distance travelled by each witness.

Where depositions are drawn by the solicitor, under a stipulation between the parties, no higher charge can be allowed for the draft or engrossment thereof than if the service had been performed by the proper officer of the court.

A copy of the pleadings and depositions for the use of counsel is not taxable against the adverse party; the abbreviation of the pleadings and depositions for the use of counsel is all that can be allowed.

Where a cause, at the hearing, is directed to stand over for want of parties, if the defendant has not made the objection previous to that time, neither party ought to have costs, as against the other, for the extra expense occasioned by that proceeding.

Where a cause stood over at the hearing, with leave to file a supplemental bill, and nothing was said as to the costs; and a subsequent decree in the cause directed the defendant to pay all the complainant's costs not previously disposed of, *held*, that the costs of the supplemental bill were embraced by the decree.

Where a party successfully opposes a motion, and nothing is said about costs in the order denying the application, he is entitled to his costs of opposing, as costs in the cause, if he obtains a decree for costs.

for counsel attending prepared for argument at a term when the day has not reached on the calendar, is not provided for by the fee bill, and cannot be allowed.

Stage or other disbursements are charged, each item of such disbursements, and the occasion and circumstances of the expenditure, are particularly specified in the bill of costs, and sworn to.

Duty of the taxing officer to see that the several provisions of the statutes relative to the taxation of costs are complied with, and that the taxation is opposed or not.

Fees for attending the master to obtain his signature to a summons, attending to obtain his report after it has been completed, are provided for by the fee bill, and are not taxable.

Solicitor cannot be allowed for an engrossed copy of charges or disbursements before the master; nor for engrossing objections to the draft of the master's report. The allowance for engrossed copies to file, applies to copies of such papers as are directly or ultimately to be filed in the master's or clerk's office.

Duty of a party who is dissatisfied with the taxation, as to particular items in the bill of costs, to bring the questions as to such items before the court by a motion on his part, although the adverse party applies for a retaxation as to other items.

Motion, on or other papers, on which an application for a retaxation is made, should distinctly refer to, or point out, the particular items or items in the bill of costs, as to which a retaxation is sought.

Instructions as to the manner of serving the subpoena on a party are not taxable; and no allowance for serving the subpoena can be made, by way of disbursement, beyond the sum fixed by the fee bill. Motion is made or opposed by counsel, other than the solicitor on the attendance fee of the solicitor is taxable although he did not attend in person; but where the solicitor makes or opposes the motion, and is allowed therefor as counsel, he cannot charge an attendance fee as solicitor also.

Attendance can be made to the solicitor for attending the hearing of a cause, unless he attends in person.

Fees for perusing, amending and signing pleadings, can only be allowed when the service is actually performed by counsel other than the solicitor in the cause; and where the name of the solicitor alone is signed on engrossed pleadings as counsel, the presumption is that no other counsel has perused and signed the drafts.

Drafts of pleadings in litigated causes should be submitted to the actual perusal of the senior counsel, before they are engrossed and filed.

Fees for perusing and settling a decree applies to a final decree only, and cannot be allowed on a mere decretal order.

Fees as to settling decrees and special orders.

Requirement of an affidavit of regularity, on bills taken as confessed,

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applies to mortgage cases only. The affidavit is proper, however, in other cases of bills taken as confessed, under the revised statutes, to enable the court to ascertain whether the defendants have been personally served with process, or whether they are proceeded against as absentees and a short affidavit, not exceeding two or three folios, may be allowed on taxation, if it is actually made and used.

Copies of the opinion of the court, furnished to the master on a reference are not taxable.

The solicitor is entitled to charge for a notice of the taxation of his costs in addition to the specific allowance, in the fee bill, for a copy of the bill of costs to be delivered to the adverse party with such notice.

If the taxing officer, on the taxation of a bill of costs, has doubts as to the correctness of a charge, he should reject it.

The taxation of items for services not performed by the solicitor, or when the number of folios are overcharged, will not protect him from the penalty prescribed by the statute for unlawfully demanding or receiving fees for such services.

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*THIS was an application, on the part of the defendant H. Rogers, to set aside the execution issued in this suit for irregularity, or to stay the proceedings thereon; and for a retaxation of the costs. Both parties were dissatisfied with the taxation, and a conditional arrangement was entered into to bring the several questions before the court. This arrangement however was not carried into effect. And the complainants' solicitor, after waiting some time, and receiving no notice of an intention on the part of the defendant to appeal from the decision of the master, finally concluded to submit to the taxation himself as it stood. He procured the decree to be enrolled, and issued his execution. The decree directed H. Rogers to pay into court the amount reported due, within thirty days after notice of the confirmation of the report, or that the complainants have executions for the amount. He paid in the amount, but gave no notice thereof to the complainants' solicitor. This fact being unknown to the solicitor, and having been inadvertently overlooked by the register, the execution was taken out for the amount reported due as well as the costs, and was placed in the hands of the sheriff. As soon as the complainants' soli-

r discovered the money had been paid in, he gave direc-
s to the sheriff to deduct that amount from the execu-
, and send notice thereof to the defendant's solicitor.
he mean time the latter had applied to the chancellor,
obtained an order to stay the proceedings on the exe-
on, and also an order to show cause, &c., with a view
retaxation of the costs, and to have the execution set
e or corrected.

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. *Waite* and *S. Stevens*, for the complainants.

Lansing, for H. Rogers.

THE CHANCELLOR. Under the decree of September,
1, it would have been proper for the defendant H.
ers to have given notice to the complainants' solicitor
the money was paid into court. The money having
actually paid, however, before the execution issued,
being deposited in the office where the decree was
lled, if it had not been overlooked by the register, he
ld not have included that amount in the execution.
a parties appear to have acted *under a mistake or mis-
rehension; and no order is now necessary as to the
ey paid into court, and neither party ought to be
ged with the costs in relation to that part of the ap-
ation.

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With the exception of one or two items, which I shall
after notice, the defendants' solicitor seems to have
cted before the taxing officer in the proper form, so
o call the attention of the officer, and of the solicitor
the complainants, to the specific objections which are
made to the several items complained of as improp-
taxed. As to most of those items, the affidavits and
lence produced before the master were sufficient, on
part of the complainants, to establish the fact that the
ices had been performed, and that the number of
s were correctly charged. As the pleadings were
or. II.

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produced on the taxation, if the complainants' solicitor had made a mistake in his affidavit as to the number of folios, the defendants' solicitor had the means of correcting such mistake on the spot. Without an affidavit or some other evidence of mistake, this court will now take it for granted that the number of folios was right, and will not take upon itself the labor of counting these voluminous pleadings. The questions were fairly raised before the master, as to the legality of particular items, and the propriety of their allowance, under circumstances which were undisputed, and if he has erred in the taxation, this court must correct his decision.

The first objection is, that the complainants' solicitor was not entitled to a retaining fee, inasmuch as he signed the bill both as solicitor and counsel and a retaining fee for counsel is allowed. The affidavit showed that three counsel at least, other than the solicitor, were employed in the progress of the cause; and two of them were retained generally as counsel. Retaining fees, both for solicitor and counsel, were therefore properly taxed, although the solicitor on record alone signed the bill as counsel. The objection to the charges for instructions to the clerks of the supreme court and to the clerk of the county to search for judgments, appears to have been well taken. In those cases where by the practice of the court it is necessary to make judgment creditors parties, as in bills of foreclosure, the charge is proper if the *service was actually performed. But in this case there was, *prima facie*, no necessity of searching for judgment creditors of the defendant; and the taxing officer should not have taxed those items without some further evidence to show why such instructions were necessary. Where the object is merely to get an exemplification of a record, to be used as evidence or otherwise, the charge for instructions to search cannot be allowed. The objection as to the number of folios in the bill and other pleadings was made before the taxing officer; but as the pleadings were pro

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dicted before him, as well as the affidavit of the complainants' solicitor, I shall presume they were correctly taxed. (*Lyon v. Wilkes*, 1 Cowen's R. 591.) There is no affidavit that any mistake was made by the taxing officer in this respect, except as to the original bill. I shall, therefore, not take the trouble of counting the folios in all of these voluminous pleadings to ascertain whether the taxation is right as to the rest. I have examined the original bill, and find it has in fact been taxed at about ten folios too much. That item, including the draft, engrossment, abbreviation and copies of the bill, must be reduced; and the solicitor for the defendant, on the retaxation, may also be permitted to show to the taxing officer that a similar mistake has occurred as to any other pleading or proceeding. Under the fee bill of 1818, those parts of the will which are copied verbatim, must be rejected in allowing for the draft of the bill. (And see 2 R. S. 651, § 13.)

The subpoena issued upon the original bill could not have exceeded two folios. That upon the supplemental bill, which contained so many parties, probably amounted to more at the rate of 90 words to the folio as the law then stood. But the complainants could only be allowed for one draft thereof. (*Jackson v. Mather*, 2 Cowen's R. 584. 2 R. S. 651, § 12.) The copy of the subpoena to annex to the affidavit of service was unnecessary and is not taxable. The original subpoena might have been annexed; or, the two folios allowed for the affidavit would have been sufficient to have described the process served, without any annexation whatever. The subpoenas for witnesses probably amounted to three folios. The allowance settled by the supreme court, under the present fee bill, is three folios for the draft and engrossment of the original subpoena, and two for the draft and copies of the tickets. As the number of words in a folio are now the same in both courts, that must be considered the proper allowance here. By the fee bill of 1813, (2 R. L. 20,) twelve and a half cents were allowed for subpoenaing a witness in this

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court as well as in all others. The same allowance is contained in the revised statutes, in the bill of attorneys' fees in the supreme court. But I believe, through mere inadvertence, no provision is now contained in any statute, prescribing the allowance for serving a subpoena upon a witness in this court and perhaps in some other courts. The former allowance must therefore be continued here until the legislature shall otherwise direct.

Under the fee bill of 1818, a precipe or written request to the register to enter a common order was allowed. But the revised statutes having abolished all precepes, no charge of this kind, or which is in the nature of an allowance for a precipe, can now be taxed. The only charge to which the solicitor is entitled is fifty cents for attending the register to enter the order. I do not perceive however that the master has allowed for any such written request made since the revised statutes went into operation. Interrogatories were necessary and proper, at the time the parties commenced taking their testimony in this case; and the copy annexed to the testimony was to be filed therewith. The master has therefore properly allowed for the engrossment of that copy. The other copies allowed for on taxation, also appear to have been proper charges at that time. The same allowances are still proper under the present fee bill where interrogatories are annexed to a commission, as directed by the 72d rule. But the charge for notice that the copy delivered was a copy of the interrogatories, was improperly allowed; and all similar charges must be rejected. When a party serves a copy of a bill, answer, order, interrogatories or other proceeding, and which on its face purports to be a copy of such pleading or proceeding, it cannot be necessary to give notice to the solicitor on whom it is served that it is what it purports to be. It is irregular to serve a paper purporting to be a copy of the bill or answer in a cause, if the *original has not been actually filed; or to serve a copy of an order which has never been made. All

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stices which were not required by the practice of the court, should have been rejected by the taxing officer, as useless and unnecessary services.

The affidavit of the service of the notice of order to answer appears to have been necessary and proper, as it furnished the evidence on which to found an order to take the bill as confessed. If the affidavit was actually made, it was properly allowed in the taxation, although its use was afterwards rendered unnecessary by the putting in of the answer. But the affidavit of service of notice of the examination of a witness is not usually made, or needed. The charge for this affidavit therefore ought not to have been allowed without some evidence to explain how it became necessary to make and use such an affidavit, which could only be wanted on some special application to the court. If several witnesses were to be examined at the same time and place, only one notice of examination, embracing the names and additions of all those witnesses, could have been taxed. A separate notice of the examination of each witness will never be given in such a case, except for the mere purpose of swelling a bill of costs. The notices of the examination of the several witnesses, from the examiner, are not required by the practice of the court, and should have been disallowed.

The affidavits appear to establish the fact of the attendance of the witnesses, as taxed by the master. The claim for a further allowance for travel in coming before the examiner and returning, if the distance was less than fifteen miles in travelling both ways, was properly rejected. No allowance ought not to be made, unless there is evidence that the witness was required to attend so early, or was detained so late, that he could not come or return, within the usual hours of travelling, on the day of his examination. If the whole distance both ways is over fifteen miles and under thirty, one day should be allowed for travel; and if over fifteen miles each way, the witness should be allowed one day to come and one to return,

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independent of the time he is detained for examination Where travel is claimed, the affidavit *should show the probable distance travelled by each witness. (*Shufelt v. Rowley*, 4 Cowen's R. 58.) The charges for expenses paid to the witnesses, beyond the amount of the per diem allowance, were properly rejected. They were not taxable against the adverse party.

Those depositions which were taken on and before the 24th of April, 1823, were properly charged at 25 cents for the drafts. On that day the allowance for drawing depositions was reduced to 20 cents. Those taken subsequently can only be taxed at the latter rate; and the engrossment of all must be taxed at twelve cents only. Although the depositions were drawn and engrossed by the solicitors, for the sake of convenience, that will not authorize them to tax at a higher rate than if the service had been performed by the proper officer of the court. The copy for the adverse party was properly allowed, under the stipulation; as he would have been obliged to pay the examiner for a like copy, and at the same rate. The allowance of twelve and a half cents for swearing each witness, was rightly substituted by the taxing officer, instead of the gross sum paid to the examiner for his travelling expenses, &c., in performing that service. Although the manner in which the testimony was taken in this case may have saved some expense to the parties, it would be a dangerous innovation to permit the taxing officer, upon such a suggestion, to depart from the allowances as fixed by the fee bill. The charges for serving the copy of the depositions, and for the notice of its being a copy, should have been wholly disallowed. There is no allowance in the fee bill for serving a paper of that description; and the notice was unnecessary for the reason before stated.

In the case of *Decaters v. La Farge*, at the last May term,(a) this court decided that copies of the pleadings

(a) *Ante*, p. 411.

depositions, &c., for the use of counsel were not taxable under the fee bill of 1818, nor under the fee bill in the revised statutes. The abbreviation is all that is necessary; especially where the solicitor is allowed one copy in addition to the draft for his own use. He can loan that copy to his counsel if it should be desired *by the latter to examine the pleadings more at length. The complainants were obliged to furnish copies of all the pleadings and depositions, at the August term, 1828; as the rule of the 23d June did not go into effect until the end of that term. The charge for those copies is therefore correct, with the exception of the mistake as to the number of folios. But the master has inadvertently again allowed for abbreviating the supplemental bill at that term for the use of counsel, although the abbreviation had before been allowed. The charge for an abbreviation of the report was improper, as no such allowance is contained in the fee bill.

The question whether it was not necessary to make all the heirs of Thomas Rogers and of T. Rogers, junior, parties to this suit appears to be a very plain one. And if Rogers had made the objection in his answer, instead of raising it for the first time at the hearing, the complainants would have been charged with all the extra expense which was produced by their neglect to amend their bill, so as to bring the proper parties before the court, in an earlier stage of the cause. (*Mitchell v. Bailey*, 3 Mad. R. 61. Jac. R. 163.) Both parties were probably equally in fault on this subject, as the facts were equally in the knowledge of both. For this reason I have some doubts whether each should not have been compelled to bear his own share of the unnecessary expense, which has arisen in consequence of not sooner correcting this mistake, and of not making the objection the first opportunity. But as Chancellor Sandford made no disposition of those costs when he ordered the supplemental bill to be filed, and my attention was not called to this subject at the time of making the decree of September,

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1831. 1828, I am inclined to think the complainant's share of
 Rogers them must be allowed against the defendant, under the
 v. terms of that decree. As the greatest part of the supple-
 Rogers. mental bill, however, is a mere copy of the original bill,
 and of the answer of H. Rogers thereto, the solicitor for
 the complainants must not be allowed for the draft of that
 part, nor for the second abbreviation thereof for the use
 of counsel. The costs of opposing the motion made by
 the defendant, in which the opposition was successful, are
 properly taxable *as costs in the cause; nothing being said
 as to those costs in the order. (1 Sim. & Stu. 357.)

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The precipe or written request to enter the order to
 answer, previous to July, 1824, was not taxable even
 under the old fee bill; as it was at that time a special
 order, made by the court. Those charges should there-
 fore have been disallowed. The double charge for notice
 to the clerk to set down the cause, and for notice of the
 issue, &c., must be corrected as often as it occurs, accord-
 ing to the decision in *Doe v. Green*.(a) The charge for
 two counsel attending prepared for the argument of the
 cause at a term when it was not reached on the calendar,
 is not provided for in the statute. In this respect there is
 a marked difference in the language of the last item of
 allowance for counsellors' fees in this court, and that
 which is used in the corresponding provision as to coun-
 sellors' fees in the supreme court. The same difference
 is found in the revised laws of 1813. This difference
 could not have been the result of accident; especially as
 the legislature in the last revision, intentionally altered
 another item in the fees of counsel in this court, on the
 recommendation of the revisers, which clearly shows that
 they intended to allow a counsel fee for attending pre-
 pared for argument in the one case but not in the other.
 I believe the uniform construction of the fee bill, by my
 predecessors, has been to disallow the charge for attend-

(a) Ante, p. 347.

ng prepared to argue the cause, if the same was not in act reached on the calendar. However equitable the allowance may be where the counsel attend in good faith supposing the cause will be reached, this charge must continue to be disallowed on taxation until the legislature shall interfere and change the law.

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Two charges for postage, in the whole amounting to nearly \$28, are taxed in gross, without any specification of the items. The statute (2 R. S. 653, § 7) provides that disbursements shall not be allowed without an affidavit specifying the items thereof particularly. Under this provision, every item, for postage or other disbursements, should be stated particularly in the bill of costs or in the affidavit; *specifying briefly the occasion and circumstances of the expenditure: as, "Postage on letter to register inclosing bill to be filed, \$0.50; Postage on letter directing the enrolment of decree, \$0.25," &c.; so as to enable the taxing officer to judge of the necessity and reasonableness of each item of the disbursement. This specific objection does not appear to have been made before the taxing officer, or it would probably have been obviated, as there was a general affidavit as to the correctness of the charge. But it is the duty of the officer to see that this and other similar directions of the statute are complied with, whether the taxation be opposed or not. The taxation must be reviewed as to these charges; but the complainants are to be permitted to furnish to the master, on the retaxation, a bill of the items of postage, with a new affidavit as to its correctness.

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The charges for attending the master to obtain his signature to summonses, and to procure his report after it was completed, are not found in the fee bill, and must be disallowed. The item in the fee bill for "attending a master upon any matter referred to him not herein otherwise provided for," &c., will be understood by referring to a similar allowance in the act of 1818, and to Chancellor Kent's remarks thereon, in his report to the legislature.

1881. (Blake's Prac. 1st ed. app. 122.) It was meant to provide a general allowance for attending on references to the master in all cases, except references to take and state accounts and to tax costs, which are otherwise provided for in the fee bill. Under a different item in the fee bill, the solicitor is entitled to 50 cents for attending before the master, to settle the draft of the report, when summoned for that purpose, and on other occasions of that kind. But he is not allowed for attending before the master merely to get his signature to a summons for the adverse party, or to obtain the report after it has been completed. The allowance for drawing charges, at the time the services contained in this bill of costs were rendered, was 20 cents instead of 25 cents, as allowed on taxation here. The engrossment is also improperly taxed. The allowance for engrossed copies to file is only for such copies as are directly or ultimately to be filed in the *register's or clerk's office. It does not extend to those which are merely brought into the master's office for the purposes of the reference. These are to be taxed at the usual rate allowed for ordinary copies. The same remarks are applicable to the copy of objections to the draft of the master's report, which was also improperly taxed as an engrossed copy to file. The charge for the draft of a release prepared for one of the defendants to sign, to save the expense of making him a party to the suit, appears to be proper. The proceedings to obtain special directions to the master, and to carry into effect the decree of September, 1828, were necessary, and were properly taxable as costs in the cause.

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The complainants claim several items which they allege were erroneously stricken out on taxation; and they ask for an allowance of those items, if a retaxation is directed. In ordinary cases, if either party is dissatisfied with the decision of the taxing officer, as to any particular items of the bill of costs, it is the duty of such party to bring those questions directly before the court, by an applica

tion on his part, although the adverse party applies for a retaxation as to other items. On the other hand, the court does not usually examine or direct a retaxation as to any items in the bill where the decision has been against the party appealing, unless the objections to the decision of the taxing officer, either as to the particular items or as to some general principle in which they are embraced, are distinctly referred to in the petition or other papers upon which the application for retaxation is founded. But under the circumstances of this case, where the delay of the defendant to appeal until after the issuing of the execution prevents a direct application from being made on the part of the complainants, I think it right to look into their objections at this time, and to direct the master to review his taxation as to those items also, if any of them have been improperly rejected. Although the reasons for the delay on the part of the defendant are sufficiently explained, that delay must not be permitted to prejudice the other party. Some of the items claimed, I have already noticed.

The charge for instructions to the surrogate was properly rejected. It is somewhat doubtful whether even the *exemplification of the will from the surrogate's office could have been necessary after it had been set out at full length in the answer of H. Rogers to the original bill. It may, however, have been procured before that time, though charged afterwards. The original subpoena was obtained from the clerk, previous to the act abolishing the office of clerk in chancery at Albany; and no orders for the issuing of subpoenas were ever entered in his office. They are now entered under the general order of January 9th, 1830. The manner of serving the subpoena on a defendant is prescribed by one of the standing rules of the court; and the charges for instructions as to the manner of serving it, and for disbursements, beyond the allowance fixed by the fee bill, were properly rejected by the taxing officer. Several items now claimed by the complainants

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1831. were properly stricken out of the bill, on the ground that
 Rogers they were charged a second time. Others were properly
 v. rejected as not taxable, under the decision in *Doe v. Green*,
 Rogers. before referred to, and other recent decisions, which it is
 not necessary now to refer to particularly.

Several charges for the solicitor's fees on special motions and petitions were rejected by the taxing officer; I presume, upon the ground that the solicitor did not attend in person, or that he also acted as counsel in the cause on the same application. This does not appear to be one of those cases where a personal attendance of the solicitor is necessary to entitle him to make the charge. The service is generally performed by his agent. But if the solicitor was himself the counsel and has been allowed fees in that character for his services on the application, he cannot be allowed fees for attending also as solicitor on the same application. (2 R. S. 651, § 8.) The allowance to the solicitor for attending on the hearing of the cause is placed on a different footing by the fee bill. And it is perfectly evident, as well from the wording of the law as from the note of Chancellor Kent, who framed this provision and incorporated it into the fee bill of 1818, that it was never intended to grant the allowance for a mere constructive attendance. To entitle the party to make that charge, there must be an actual attendance in person, on the *argument, by the solicitor on record. The employment of another solicitor to attend as his proxy in this case was not a sufficient compliance with the provision of the statute to justify the allowance of those items on the taxation.

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The affidavit of the solicitor, exhibited to the master, shows that the services of perusing, amending, and signing the pleading, interrogatories, exceptions, &c., were actually performed. It also appears that several counsel were employed in the progress of the cause. But these proceedings are only signed by the solicitor on record, who was also a counsellor; and the affidavit does not

tate that those services were in fact performed by any other person. This affidavit may therefore be true, and yet the real fact may be that none of the other counsel in the cause ever perused the drafts, or examined the pleadings, until after they were engrossed and filed. Where the name of the solicitor alone appears as counsel on the engrossed pleadings, it requires strong evidence to establish the fact that other counsel examined and signed the drafts. If such was the case here the affidavit should have been direct and positive. The master was therefore right in disallowing these charges. Had the original bill, as drawn by the solicitor, been carefully examined by the other counsel in the cause, they might have suggested the necessity of making all the heirs parties thereto; and thus have saved the extra expense of the supplemental proceedings. Solicitors, who are many of them only junior counsel, are not aware of the importance of submitting the draft of their pleadings, and particularly of the original bill, to the scrutinizing examination of the senior counsel in the first instance. The services of such counsel in contested cases are frequently of more importance to the client in framing the bill or in preparing the answer, than upon the final argument of the cause before the court. And I am every day compelled to regret that the preparation of the pleadings in litigated causes in chancery, and the signature of counsel thereto, are by too many considered as merely matters of form. A very considerable proportion of the actual expense of litigation in this court, is unnecessarily produced by the neglect of the solicitor to consult with the counsel in the cause, at an early period, as to the framing of the bill, and as to the necessary parties to the suit.

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The charge for perusing and settling a decree cannot be allowed on settling a mere decretal order. It is confined to a final decree in the cause. The charge for settling the final decree was allowed by the master, and all the others were properly rejected. The charges for solici-

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tors' fees for attending the chancellor to settle orders and decrees were not taxable. No provision for such services is contained in the fee bill. It is neither an attendance on petition or special motion. The solicitor is allowed for attending the register to settle the decree according to the decision of the court. If the register has any difficulty in settling it, he submits the draft and objections to the decision of the chancellor. (*For the origin of this practice, see North's Life of Lord Keeper Guilford, 202.*) If the solicitors, for their own convenience, submit the question directly to the chancellor, as they frequently do, no additional charge should be made.

An affidavit of regularity, containing ten folios, was unnecessary. The rule which requires an affidavit to be produced on the hearing, confines it to mortgage bills which are taken as confessed. But it may also be proper in other cases, where the bill is taken as confessed as to any of the defendants, to produce a short affidavit, or the certificate of the register, on the hearing, stating in general terms that the bill has been regularly taken as confessed against those parties, and specifying whether it was done after an appearance, or upon personal service of the subpœna, or on a proceeding against the defendants as absentees. In no ordinary case, however, can it be necessary that the affidavit should exceed two or three folios. To that extent it may be allowed in this case, as it was actually made and used.

The copies of the opinion of the court, for the master on the reference, were not taxable. The decree or order of reference contains the directions which are to govern the master in taking the account. The decree contained no directions to the defendant H. Rogers to execute a release. An allowance, therefore, for preparing such release, could not be taxed in anticipation that it would be wanted. In the *case of *Burling v. Coggeshall*, in September, 1830, on appeal from the decision of the vice chancellor of the first circuit, it was settled that the solicitor was entitled to

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charge for the notice of taxation, in addition to the allowance for a copy of the bill of costs to be delivered to the adverse party with such notice. The intention of the revisers in changing the phraseology of the last item of the fees allowed to solicitors, was to define with more precision the object of the delivery of the copy of the bill of costs before taxation; not to reduce the amount, nor to deprive the solicitor of the allowance for notice of the taxation of such bill, to which he was entitled under the act of 1818. This item for notice of taxation must therefore be allowed.

The bill of costs in this case must be retaxed by the taxing master of the fourth circuit, on the principles here stated; and without costs to either party. The items not objected to or claimed on this application, and those as to which nothing is said in this opinion and which are not embraced in the principles here laid down, are to remain as previously taxed. The proceedings on the execution must be stayed until eight days after the retaxation is completed; at which time, upon producing to the sheriff the certificate of the master stating the amount at which the costs are taxed, he is to proceed and collect the amount on the execution, if the same is not sooner paid to him by the defendant.

It is to be regretted that appeals from the taxing officers in relation to questions of costs should be so frequently made to this court. These contests are calculated to injure the profession in the eyes of the community, and to bring its members into disrepute. The legislature have provided a fair and liberal fee bill for the practitioners in this court; and they should be satisfied with charging for such services as are clearly within its provisions. But if so much of the time of the court is to be consumed in these constant struggles to get compensation for fictitious services, or to obtain allowances of a doubtful character, the legislature will be compelled to interfere and to change the mode of compensating for professional services. The

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correct rule for fair practitioners is to make no charge ~~but~~
for services actually and necessarily performed, and which
come clearly *within the provisions of the statute. And
the proper rule to be observed by the taxing officer is to
reject a charge if he has doubts as to its correctness.
Even the taxation of an item will not protect the solicitor
from an action for treble damages, if he charges and ob-
tains payment for services which were not actually per-
formed; or if he receives compensation for a greater
number of folios than were contained in the proceedings
which were drawn, engrossed, or copied by him. (2 R.
S. 650.)

These remarks are not made in reference to the bill of
costs in this particular case, but to call the attention of
the bar to the subject, as one in which they all have a
deep interest; and in which the character and welfare of
the members of this most honorable and useful profession
is in some measure, involved.

WHITE v. BULOID AND OTHERS.

The personal representatives of a deceased complainant may be
stituted as complainants on motion or petition, under the statute
out resorting to a formal bill of revivor.
But if the other parties in the cause, who have appeared, do not
the application to substitute the representatives of the de-
ceased as parties in his place, they must have due notice of
the application.

Whether, on an appeal from a decision of a vice chancellor de
parte application, the appellant can bring on the argument
ex parte? Quære.

If a deceased complainant was before the court in two differ-
ent characters, and by his death the rights in one character are cast up
in the cause, and in the other character upon the pers-
onal representative, whether the latter can be substituted as complainant
under the statute? Quære.

July 19th.

This was an appeal from the decision of

of the first circuit. The complainant was the only executrix of Charles White deceased, who had obtained a copy of the will; and the bill was filed by her to reach the principal funds, the proceeds of his estate, which the complainant claimed on account of a debt alleged to be due from the decedent. Some of the defendants appeared and answered; and the cause being at issue, the parties had commenced taking testimony therein when the sole complainant died. Mrs. Buloid, one of the defendants, as surviving executrix of C. White, thereupon obtained letters testamentary, *de bonis non*, &c., upon his estate; and administration of the estate of Lydia White deceased complainant, with the will annexed, was committed to the public administrator of the city of New York. The latter, on affidavit of these facts, made an immediate application to the vice chancellor of the first circuit before whom the cause was pending, to be made complainant in the suit, according to the statute. The vice chancellor decided that the suit being entirely abated, by the death of the sole complainant, it could not be revived by her personal representative, by motion or petition under the provisions of the revised statutes; but that a writ of revivor was necessary. From this decision the public administrator appealed to the chancellor.

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Silliman, for the appellant, submitted the case, except on a written brief.

THE CHANCELLOR. I have some doubts as to the regularity of bringing on this appeal without notice to the defendants who had appeared in the suit before the vice chancellor. Although they had no notice of the application to the judge *a quo*, yet they have an interest in the decision, and will be affected by the order of the chancellor if the decision of the vice chancellor is reversed. As the result must be the same, and the decision on appeal will not be considered *res adjudicata* against the public administrator.

1831. them, if they think proper hereafter to discuss the same
 White questions, I shall proceed to dispose of the appeal upon
 v. the ex parte argument of the appellant's counsel. (See
 Buloid. *Linwood v. Hathorn*, 3 Bligh's P. Rep. 200.)

[*477] The order of the vice chancellor, refusing the ex parte application to revive, was correct; but not for the reasons stated in that order and in the opinion endorsed on the papers. The 115th, 116th, and 117th sections of that title of the revised statutes which relates particularly to this court, (2 R. S. 184,) were intended to embrace the provisions contained in the last clause of the 7th section of the act of 1813, "concerning the court of chancery," (1 R. L. of 1813, 489,) *and which were also contained in previous revisions. Although the language of these provisions has been somewhat varied since the act of 1788, yet I believe its uniform construction has been to give to the personal representatives of a sole complainant the right to revive on motion, to the same extent as they would be entitled if there had been another complainant who had survived. The 115th section is broad enough to embrace the case of an abatement of the suit by the death of a sole complainant. If his rights are cast upon those representatives which the law gives or ascertains, I see no reason why they should not be substituted as complainants under the statute, instead of compelling them to resort to the more expensive proceeding by bill of revivor. Numerous orders of this description have been made by the court, for the last twenty years; and even if this construction of the statute was originally wrong, it is now too late to change it except by legislative interference.

But where, as in this case, the defendants, or some of them, have actually appeared in this cause, it is irregular to obtain an ex parte order to revive, without the consent of the parties who have appeared. If they do not join in the petition to revive, due notice of the application should be given to them, or their solicitor, in the usual

manner of serving notices on parties who have caused their appearance to be entered in a cause in this court.

In *Douglas v. Sherman*, decided in March last,(a) the practice to be pursued in such cases was fully stated and settled. The vice chancellor should therefore have denied this application; but without prejudice to the right of the public administrator to present a new petition, briefly stating the facts which entitle him to be substituted complainant in the place of the decedent Lydia White, and giving due notice of the application to all the other parties who have appeared in the cause. In this case, as the rights of the former complainant as the executrix of Charles White, are now cast upon Mrs. Buloid the surviving executrix and one of the present defendants in the cause, that fact also should be stated in the petition; so that the suit may be *revived against her in that character also, if it can be legally done in that form.

The order of the vice chancellor refusing the application of the appellant must be affirmed, but without adopting the reason stated in the order, and without prejudice to the right to present such petition; on which petition all parties may be heard before him as to the right of the appellant to an order of revival. (*Young v. Liven*, 4 Dow's P. C. 143.) As none of the defendants have been heard on this appeal, I do not intend to express any opinion upon the question whether this suit can be revived against Mrs. Buloid as the new executrix of Charles White, without a formal bill of revivor, under the very peculiar circumstances of this case. That question is left open for discussion before the vice chancellor, if the appellant should think proper to proceed by petition instead of resorting to the more certain remedy of a bill of revivor, or a bill of revivor and supplement.

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(a) *Ante*, p. 353.

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STEELE AND OTHERS v. WHITE AND OTHERS.

Where a person interested in a suit voluntarily compromises the ~~suit~~ without any fraud or imposition practised upon him, he cannot be relieved from the compromise, although he shows it was not beneficial for him, or shows that he had the right to recover in the suit in point of law.

Where a party has released all his interest in a suit, he has no right to appeal from an order made therein which cannot prejudice him, although it may be wrong as against other parties.

An appeal cannot be sustained by a person who cannot be injured by the alleged error of the judge *a quo*, unless he is the legal representative of a party who may be injured thereby.

July 19th.

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THIS was an appeal by Charles Lydia White from an order of the vice chancellor of the first circuit, directing certain surplus moneys paid to the clerk of the late equity court in that circuit, to be paid to the legatees of Charles White, deceased. The money in court arose from the sale of certain real estate of C. White, under a mortgage foreclosure against his heirs and devisees. Lydia White, the widow and executrix of C. White, claimed the money on the ground that the estate mortgaged was either held in trust for her, or that she had a *valid claim against her husband, as his creditor under an antenuptial contract. She filed a bill against the heirs and legatees of C. White, by the direction or permission of the equity court, to settle the rights of the several parties to the fund. That cause was at issue, and the parties had commenced taking testimony therein at the death of L. White. A cross bill was also filed against her for a discovery, and also for an account of the estate of her late husband, which had come to her hands as executrix; which cross bill had been taken as confessed against her, for want of an answer, a short time previous to her death, and continued in that situation. None of the suits having been revived, and no administration granted, either on her estate or on

at of C. White after her death, and Isabella Steele, one of the children and legatees of C. White, having intermarried with R. Buloid, an agreement was entered into between Buloid and wife, and Thomas White and C. L. White, so far as related to their rights, to discontinue the controversy, and to distribute the fund according to the will of C. White. A petition was thereupon prepared, setting forth these facts, and also that J. Cockroft, the executor named in the will of L. White, but who had not proved the same, and who, together with C. L. White, were the only children and legatees of Lydia White, was satisfied with the arrangement, and would not oppose the application; and praying that the money might be paid out of court to the petitioners accordingly.

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This petition was presented to the vice chancellor of the first circuit, on the second Tuesday of February, 1831, but upon the request of the solicitor, who filed the bill for Lydia White, who being in court, opposed the petition upon the ground that his costs had not been paid, the hearing of the same was postponed until the then next motion day. In the mean time C. L. White revoked the authority of the solicitor who presented the petition, and directed him not to present in his name. The other petitioners then gave notice to C. L. White of presenting the petition on their own account, so far as related to their own rights under the compromise; and it was presented accordingly. The application was opposed by C. L. White's solicitor, but the vice chancellor made an order for the payment of the fund in court to the petitioners, according to the compromise.

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W. Silliman, for the appellant.

T. Fessenden, for the respondents.

THE CHANCELLOR. On examining the facts sworn to in the petition and in the affidavits presented to the vice

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chancellor for and against the application, I think there is no sufficient ground to justify a belief that Charles Lydia White was imposed upon or defrauded in the compromise which was made between him and the other petitioners. Whether the compromise was a beneficial one to him, is not material to consider. In *Lewis v. Cooper & Flinn*, (Cook's R. 467,) the supreme court of errors and appeals in Tennessee decided that a party was bound by a compromise of a lawsuit; and could not be relieved in a court of equity, if there was no fraud, although he had agreed to pay more than the law would have compelled him to pay. So far as the question of right was concerned in this case, both parties were upon an equal footing. The suit had been long pending, and C. L. White was a party thereto, and managed the suit for his mother. He therefore undoubtedly knew and understood the nature and extent of her claim. He did not then, neither does he now know what would have been the legal result of the suit if it had been continued.

In the petition and the affidavit annexed thereto, he swears that the estate of his mother was sufficient to pay all her debts and legacies, independent of the claim upon this fund; and he and Cockroft were her sole heirs, legatees and devisees. He subsequently swears that she left no property except her claim upon this fund, having distributed her property before her death; and that she was indebted to her solicitor for the costs in the suit. If the last affidavit contains the correct statement of the facts, it was a case in which her creditors had an interest, and perhaps the court ought not to have ordered the money to be paid out to the irresponsible brother without security to refund if her personal representatives revived and finally succeeded in the suit. But even in such a case, the compromise and agreement of *C. L. White was valid and binding on him, to the extent of his interest in the surplus after paying the debts of his mother and the expenses of administering her estate. He therefore has no

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interest in this question, and is not injured by the order from which he has appealed. Neither is he the legal representative of, or a trustee for the creditors of his mother, or for any other person whose rights are affected by the order. If the decision of the vice chancellor was right so far as the interest of the appellant was concerned, the decree must be affirmed as to him, although the rights of other persons are violated.

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If the creditors of Lydia White could not have appealed from this order, before administration was granted to a person competent to appeal and protect their rights, as to which I express no opinion, they probably might, under the particular circumstances of this case, have filed a bill and obtained an injunction to protect their rights. But whether they had any remedy or not, this court cannot sustain an appeal by a mere volunteer for their benefit. The case of *Reid v. Vanderheyden*, (5 Cowen's R. 719,) in the court of errors, is conclusive to show that an appeal cannot be sustained by a person who cannot possibly be injured by the alleged error of the judge *a quo*; unless such person is the legal representative of a party who may be injured thereby.

The order of the vice chancellor, so far as it affects the interest of the appellant, is correct; and it must be affirmed, with costs to be paid by him. And the appeal, so far as it seeks to review the decision of the vice chancellor, on the ground that the order injuriously affects the rights of others, not parties to this appeal, must be dismissed.

**APT HORP AND OTHERS v. COMSTOCK AND OTHERS.*

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Where a deed is alleged to be a forgery, and has been improperly certified as duly proved and recorded, the court of chancery may take jurisdiction of the cause, for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits. But in such a case, it is

1831. proper to submit the question, as to the genuineness of the deed, to a jury under the direction of the court.
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Comstock. Although the court of chancery in the exercise of a sound discretion may decide matters of fact, without the intervention of a jury; yet, if important rights are depending on mere questions of fact, it may be proper to award a feigned issue for the trial of such questions of fact.
- Where a feigned issue is awarded, the court may impose such restrictions on the parties as will prevent all fraud or surprise upon the trial of such issue.
- Where the court of chancery directs an action to be brought, although particular directions are given, the parties in other respects are left to their legal rights, and the application for a new trial, in such a case, must be made to the court of law in which the action is brought, and subject to the rules which govern such court in other cases.
- Where an issue is directed, it is to inform the conscience of the chancellor, and the application for a new trial must be made to this court.
- The court of chancery will not direct a new trial of a feigned issue, merely on the ground that improper testimony was received on the trial, or that the judge rejected that which was proper, if, on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different if such testimony had been rejected in the one case or received in the other.
- Where a fraudulent combination is established, the acts and declarations of any one of the parties thereto may be proved against the others. But only such acts and declarations as constitute a part of the *res gesta* ought to be so received.

January 20th,
1829. This case is reported in 1 Hopkins's R. 143, and in 8 Cowen's R. 386. After the decision of the court of errors on the appeal of the defendants, testimony was taken in the cause, and a great number of exhibits were put in and proved before the examiner. Most of the exhibits were produced for the purpose of showing by comparison of hands that the deed was a forgery; and that John Jarvis, of Cold Spring, was the witness who appeared before the commissioner and swore to the execution of the deed. The cause was brought to hearing on pleading and proofs.

[*483] *S. M. Hopkins, for complainants.

F. A. Tallmadge and J. Tallmadge for defendants.

THE CHANCELLOR. It is not necessary for me to examine the question whether this is a proper subject of equitable jurisdiction. This question was distinctly raised before Chancellor Sandford, on motion to dissolve the injunction in this cause and in the court of errors on the appeal from his decision. In both cases the jurisdiction of this court was sustained. I have no doubt of the correctness of these decisions. But if I were of a different opinion, I am not at liberty to overturn the decision of the court of errors, which has now become the law of the case, on that point. I have looked into the several opinions delivered in the court of errors, and find this question must have been passed upon by that court. The jurisdiction of the court in this case has been sustained on the ground of the alleged forgery of the deed to Enoch Comstock; or, upon the charges in the bill, that it is now attempted to be used for the purposes of fraud; that the proof endorsed upon the deed whereby it was admitted to be recorded, was surreptitiously obtained, by an imposition on the commissioner, and by perjury; that the deed remains a cloud upon the complainant's title, and cannot be removed from the record; and that the title cannot be settled so as to prevent a multiplicity of suits without the aid of this court. Whatever opinion may be formed as to the genuineness of the signature of Andrew Pierce to that deed, no one, who examines the facts in this case, can doubt that the proof of the deed was by the perjury of the person who was imposed upon the commissioner as one of the subscribing witnesses. Although the commissioner was not sufficiently cautious in ascertaining the identity of the witness, there is no ground to suppose he had any connection whatever with those concerned in the fraud, or that he intentionally violated his duty.

Several questions are presented by the pleadings and proofs. The first is as to the genuineness of the signatures of Andrew Pierce, and the subscribing witnesses to the deed. Even if those signatures are genuine, and on

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1881. this subject there is *certainly room for great doubt, i
 Apthorp does not follow that this deed is to be sustained. There
 v. is reason to believe, if the deed was genuine, that it was
 Comstock. found among the papers of Andrew Pierce, by Tallman,
 after his death, or at least after he ran away ; and that it
 was never in fact delivered to Comstock, in consequence
 of the bargain for the sale of the lands having been
 rescinded. Or, if it had been delivered, that it was re-
 turned, upon an agreement to rescind the sale, and with
 the intention of revesting the title in Pierce. In either
 case, the defendants would not, at this time, have any
 equitable claim to the land.

Although this court, in the exercise of a sound dis-
 cretion, has a right to decide every matter of fact which
 comes before it without the intervention of a jury, yet
 there are some cases in which important rights, depending
 upon a mere question of fact, ought not to be decided
 without giving the defendant, who has not come volun-
 tarily into this court, an opportunity to establish his
 claims before a jury. The question as to the genuineness
 of this deed, I consider one peculiarly proper for the de-
 cision of a jury. And as there must be an issue for that
 purpose, I shall at the same time give the defendants an
 opportunity to show, if they can, that this deed came into
 the hands of those who procured it to be proved before
 the commissioner, either directly or indirectly from the
 supposed grantee. I shall also impose such restrictions
 upon the parties as will prevent all fraud or surprise on
 the trial.

There must, therefore, be feigned issues made up and
 tried at the circuit in New York, unless the parties con-
 sent to a trial in the superior court of that city, for the
 purpose of settling the following points: First, whether
 the signatures of Andrew Pierce, and the subscribing
 witnesses to the deed, are genuine signatures ; second,
 whether the deed was delivered by the grantor to Enoch
 Comstock, or to any other person for his use, at the time

bears date, or at any time before the execution of the deed of the 31st of January, 1793, to Davenport; and, third, whether the person who procured the deed to be proved before the commissioner, or George Hepburn, or David Tallman, obtained the same directly or indirectly from the custody *or possession of Enoch Comstock or his heirs. Either party is to be at liberty on the trial to examine any witness whose testimony was read upon the hearing of this cause, or to read their depositions heretofore taken, if they are dead, or out of the jurisdiction of the court; and either party is also to be at liberty to read the deposition of any witness of the opposite party, which was read on the hearing of this cause. And to prevent any surprise by the introduction of new witnesses, notice of trial must be given at least thirty days before the day appointed for such trial; and no witnesses not heretofore examined are to be introduced on the trial, unless the party producing such new witnesses shall, at least fifteen days before such trial, give to the opposite party, or to his attorney or solicitor, notice of his intention to produce such witnesses, with their names and additions, and their usual place of abode or residence, with such particularity as will enable such party to find out the witnesses, and ascertain their character. But this prohibition as to new witnesses is not to extend to those who are called merely for the purpose of impeaching other witnesses; or where the judge who tries the cause shall be satisfied there is a reasonable excuse for not giving such notice, or for giving notice for a shorter period of time. The proof of the execution of the deed, taken before the commissioner, is not to be received on the trial as any evidence of the execution thereof; or of the genuineness of the signatures of the grantor, or the subscribing witnesses to the deed. The issues are to be so framed that the defendants in this cause may hold the affirmative of the several questions above stated; and they are to be at liberty to open the case and close the argument on the trial. Either party is

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1831. to be at liberty to notice the cause for trial, and neither
 Apthorp party is to be permittled to put it off without sufficient
 v. cause shown, and on the usual terms. The trial must also
 Comstock. be by a struck jury, if requested by either party.

July 19th, THE jury having found a verdict for the complainants
 1831. on each of the issues above directed, the cause was again
 heard, on a motion for a new trial, and upon the equity
 reserved.

[*486] **S. M. Hopkins*, for the complainants.

F. A. Tallmadge and *J. Tallmadge*, for the defendants.

THE CHANCELLOR. The order for the feigned issue in this cause, which appears to have been settled between the parties, has referred one question to the jury, which the court intended to have reserved for its own decision on the coming in of the postea. The last issue, which gave the defendants the privilege of showing, if they could, that the deed came from the possession of Enoch Comstock or his heirs, either directly or indirectly, into the hands of those who procured it to be proved before the commissioner, was intended to aid the court in deciding the question whether the contract to sell the land to Comstock had been rescinded. But by the form of the issue, the jury have passed directly upon the main question. They have found that neither the signature of the grantor, nor of either of the subscribing witnesses, to the deed in controversy, is genuine; that the deed did not come into the hands of those who procured it to be proved from the possession or custody of Enoch Comstock or his heirs, either directly or indirectly; that the contract for the sale of the land to Comstock was given up and rescinded by the parties; and that the deed of

e premises, if one was ever executed, was cancelled, or delivered or returned to Pierce.

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Very little new light is thrown upon this transaction the re-investigation of the facts before the jury; but a new evidence, so far as it goes, tends to strengthen, possible, the conclusion at which I had before arrived on the last point. With the finding of the jury upon a question of the rescinding of the contract of sale, I am perfectly satisfied. My own opinion, upon all the evidence, perfectly coincides with theirs, that the contract sale to Comstock was rescinded by the parties; and that if any conveyance was ever executed and delivered to Pierce, it was given up to him at that time, under a proposition that no re-conveyance was necessary; or that a re-conveyance was actually executed, and has been suppressed by those who were concerned in the subsequent deeds. In either case, the defendants have no right at this time to set up any title, derived under a conveyance from Pierce, against his subsequent grantees or their representatives. I am also satisfied, beyond all question, that John Jarvis, of Cold Spring, was the witness who appeared before the commissioner on the 13th of October, 19, and proved the deed in question; and also proved another deed from Pierce to Stiles, under which Gilbert and Hepburn pretend to claim title, through other deeds arising date two days thereafter. Whether all these deeds were forgeries, and whether Jesse Gilbert was the person who suborned Jarvis to swear to the execution of the two deeds before Ruggles, the commissioner, are questions not necessary to be decided in this cause. As the original deed from Pierce to Judson Stiles is not in evidence, it is impossible to say whether it was originally made up in the name of Judson Stiles, which now appears in the exemplification of the record, or whether it has been altered from a deed to Judson Titus, whose name is inserted therein as the person from whom the consideration was received. The question whether all or

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1831. any of the signatures to the deed in question are genuine,
 Apthorp is one of more doubt than the others upon which the jury
 v. have passed; but even as to that, the weight of testimony
 Comstock. is probably in accordance with the verdict of the jury.

It then remains to be seen whether there was any such error in the decision of the judge who tried these issues, as to render it proper to grant a new trial. And here it may be proper to observe that the principles upon which this court directs a new trial of a feigned issue, are somewhat different from those which govern courts of law in granting new trials. Where this court directs an action, although accompanied by particular directions, the parties in other respects are left to their legal rights. The application for a new trial is in that case to be made to the court in which the action is brought, and is subject to the rules which govern the proceedings of that court in other cases. But if an issue is directed, it is to inform the conscience of the chancellor; and the application for a new trial must be made here. (*Carstairs v. Stein*, 2 Rose's R. 178. *Fowkes v. Chadd*, 2 Dickens' R. 576. *Ex parte Kensington*, Cooper's R. 96.) In the latter case this *court will not grant a new trial merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different, if such testimony had been rejected in the one case, or received in the other. (*Head v. Head*, 1 Sim. & Stu. R. 150. Turn. & Russ. R. 142, S. C. on appeal. *Barker v. Ray*, 2 Russell's R. 63. *Collins v. Hare*, 1 Dow's R. N. S. 139, per Lord Lyndhurst.)

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The first objection on the part of the defendants is, that the judge received evidence of the acts and declarations of persons not parties to the suit, and who were not acting as agents for the defendants. It appears to be well settled that where a fraudulent combination is established, the acts and declarations of any one of the parties thereto

may be proved against the others. (*Patton v. Freeman*, 1 Cox's N. J. Rep. 113. *Wilbur v. Strickland*, 1 Rawle's R. 458. *Wright v. Court*, 2 Car. & Payne's R. 232.) But I apprehend that such acts and declarations only as constitute part of the *res gestæ* ought to be so received. In this case I think there was sufficient evidence of a fraudulent combination between John Comstock, Tallman, Hepburn, and some others not necessary to be here named, to extort money from the heirs of Davenport and others by means of this deed, as early as September, 1819, and probably at the time Comstock applied to Tallmadge to commence a suit in the March previous. And such combination continued for some time thereafter; probably down to the time of the trial, as to some of the parties. The acts and declarations of Tallman, Hepburn, &c., therefore formed a part of the *res gestæ*, and were admissible in evidence against Comstock. Gilbert and Jarvis had been examined as witnesses before the hearing; and the order directing the issues intentionally gave the privilege to the complainants to use their depositions, and to establish their connection with the fraud by other testimony, in opposition to particular facts sworn to by them. Admitting, however, that the judge may have erred in admitting evidence of some of the more recent declarations of Tallman, &c., there is sufficient testimony, to which no legal objection exists, to satisfy *me that an intelligent jury must always come to the same result, upon the main point on which the equitable rights of these complainants rest. On that point the conscience of the court is satisfied; and if the verdict had been different I should probably have been compelled to grant a new trial. The question of forgery is more properly a legal question. If the cause had turned exclusively on this point, the court would probably have directed an action to be brought, or would have permitted the parties to go to trial in the action of ejectment already commenced, under such re-

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1831. strictions and directions as were proper to guard against
 Apthorp further frauds. But if the deed was actually signed by
 v. Pierce and by the subscribing witnesses whose names
 Comstock. appear thereon, I think the result of this cause must be
 the same, on the other grounds established by the proofs.

I see no objection to the competency of Penfield as a witness. The only possible interest he could have had, appears to have been released before he was examined in the original cause. Neither could the declarations of Andrew Pierce after he had parted with his title, be received in evidence. They were therefore properly excluded on the trial. And this is certainly not a case in which cumulative testimony can be received, so as to justify the court in granting a new trial on the ground of the newly discovered evidence.

The application for a new trial must therefore be denied; with the costs of resisting the same, against all the defendants, except the infant and the feme covert. A decree must also be entered, settling the rights of the parties as established by the verdict, and making effectual provisions for the protection of the complainants and their grantees, by injunction, release, &c.

Although there is no reason to suppose that any of the defendants, except John Comstock, were originally parties to the fraudulent combination to cheat and to extort money from these complainants, yet they have subsequently adopted and confirmed what he and the other conspirators had done, by bringing ejectments when they could not have believed in the equity and justice of this claim, whatever opinion they *may have formed as to their mere legal rights. I cannot therefore excuse them from the payment of that part of the complainants' costs and expenses which is taxable as between party and party. The infant and the feme covert, however, are not responsible for any part of this litigation; and they are to be excused from the payment of any part of those costs to

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h the complainants have been subjected by this ine-
ble claim on the part of the defendants.[1]

1851.

Apthorp
v.
Comptone.

In the state of New York, feigned issues are abolished; and instead
f, in the cases where the power would otherwise exist to order a
d issue; or, when a question of fact not put in issue by the pleadings,
be tried by a jury, an order for the trial may be made, stating dis-
r and plainly the question of fact to be tried, and such order will be
a authority necessary for the trial. Code of Procedure. An issue
t is directed by the court to inform its conscience. *Brockett v.*
ett, 3 How. 691-2. It is made up by pleadings as at law. *Ib.* If
rdict be unsatisfactory to the court awarding the issue, either or
nt of the admission of incompetent, or exclusion of competent evidence
take of facts by the jury, the court will order another trial. *Ib.* But
cases the objection must be brought before the court ordering the

Ib. And, if that court be so constituted as that the same judges
th as a court of law and of equity, and, as a court of equity, directs
ned issue which is tried before it as a court of law, objections to the
t must be raised on the equity side of the court, as much as if the
dings had been had before distinct courts, consisting of different

Ib. A court of equity may itself decide the question whether or
party is the heir of a deceased person, without sending an issue of
o be tried at law. *Patterson v. Gaines*, 6 How. 550, 584. Where
is a great mass of contradictory testimony in the case, relating
y to matter of fact, and dependent upon the credibility of witnesses,
case proper to be submitted to a jury. *Dexter v. The Providence*
luct Co., 1 Story's Rep. 387. Where a vice chancellor, and the chan-
upon consecutive appeals, affirmed the decision of the surrogate re-
to admit a will to probate, and the court of errors of the state of
ork reversed the decisions of the courts below, that court, under the
stances, refused to direct a feigned issue, and made a peremptory
that the proceedings be remitted and the will admitted to probate.

rt's ex'r. v. Lispenard, 26 Wen. 255. Where the court has directed
ned issue to try the question of lunacy, and a third person, whose
yance was overreached by the inquisition, had consented to join in
sue, and to be bound by the result thereof; held, that the counsel for
pective parties to the suit were not authorized in abandoning the
f the issue without the sanction of the court, and in leaving the va-
of the lunatic's conveyance to be decided in some other mode. *In the*
r of Giles, a lunatic, 11 Paige, 243. And the parties, without such
on, having entered into a written agreement to abandon the feigned
the court set aside the agreement, and directed the committee of the
is to proceed to the trial of such issue. *Ib.* See *Waterman's Am.*
fig. tit. FEIGNED ISSUE.

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De Caters
v.
Le Ray De
Chaumont.

DE CATER'S AND WIFE v. LE RAY DE CHAUMONT AND
KANADY.

Where an insolvent debtor assigned all his property to C., in trust to pay in the first place, certain preferred creditors, and afterwards to distribute the residue rateably between such of his general creditors as should, within one year from the date of that conveyance, accept the provision made therein for them, and release him (the insolvent) from all further claims; and D., a creditor of the insolvent, did not receive any notice of the trust until after the expiration of the one year; but as soon as he received such notice, applied to C., the trustee, to be permitted to accept the provision made by the trust deed, upon a compliance on his part with the conditions thereof, and the trustee refused such permission; and the insolvent debtor was afterwards discharged under the insolvent act, and assigned all his interest in the surplus, which by the trust deed was to be refunded to him, to K., for the benefit of his creditors generally; it was held, that D. had an equitable right to his proportion of the trust fund, upon a compliance with the conditions imposed, he not having had notice of the trust within the year, and having done nothing since he had such notice inconsistent with his offer to accept of the provision made for him in the trust deed.

Where, under such circumstances, a creditor, in consequence of want of notice, mistake, or accident, was unable to comply with the terms prescribed, within the time limited, and who has done nothing inconsistent with an acceptance of the provision made in his favor, he will be admitted to his share of the fund, provided he signifies his election to do so, in a reasonable time.

But such of the creditors as, within the time limited, had notice of the creation of the trust, and neglected or refused to accept of the provision made therein for them, are precluded from any participation in the fund, and their only claim will be upon the surplus, if any there should be remaining, after satisfying the debts of the creditors who accepted their proportion of the trust fund upon the terms proposed.

July 19th. JAMES DONATIANUS LE RAY DE CHAUMONT, being possessed of a very large estate, consisting principally of wild lands in the states of New York and Pennsylvania, and being very *largely indebted and insolvent, in December, 1823, conveyed all his property, in the United States and elsewhere, to the defendant, Vincent Le Ray De Chaumont; in trust, in the first place, to pay certain

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red creditors, and afterwards to distribute the residue rateably between such of his general creditors as did, within one year from the date of that conveyance, in and accept the provision made for them by the deed, and release the grantor from further claims.

after the execution of the trust deed, the trustee sent his agent in Paris to give notice by letter to the real creditors resident in Europe, of the terms and conditions thereof. Most of the creditors who had no security for their debts, came in under the assignment. But complainant Jeanne Antoinette, wife of De Caters, living in the Netherlands, and a creditor to the amount of \$70,000, did not receive notice of the creation of trust within the year. When the complainants were informed of the terms and conditions of the trust deed, they instructed their attorneys in New York to apply to the trustee for permission to come in under the assignment; on complying with its conditions. The application was made accordingly, but the trustee refused to grant it unless the consent of those creditors who came in within the year was obtained, or the court directed it to be done. Le Ray De Chaumont was discharged under the bankrupt act, and assigned all his interest in the surplus, which by the trust deed was to be refunded to him, to the bankrupt Kanady for the benefit of his creditors generally, according to the provisions of the statute.

A bill was filed by De Caters and wife, in behalf of themselves and such others of the creditors as should elect to come in under the decree, for a sale and distribution of the property, and the execution of the trust; and praying, among other things, that they might be permitted to come in under the trust deed, and receive their share of the property rateably with the other creditors. The defendant put in answers, which substantially admitted the facts stated in the bill; but referred the question, as to the rights of the creditors who did not accept of the terms

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1831. contained in the trust *deed before the expiration of the
 De Caters year, to the decision of the court.
 v.
 Le Ray De
 Chaumont.

W. H. Harrison, for the complainants, cited *Dunch v. Kent*, 1 Vernon's R. 260, and *Spottiswood v. Stockdale*, Cooper's R. 102.

Thomas L. Ogden, for the defendants.

THE CHANCELLOR. The right of the complainants to come in and share with the other creditors the fund created by the trust deed, does not, as supposed by their counsel, depend upon any general continuing equity in their favor notwithstanding their neglect to comply with the condition in the deed. In the case of *Dunch v. Kent*, it is true, the complainant insisted there was a continuing trust in favor of all the creditors, although they did not come in within the year. But this question does not appear to have been decided. In that case there was an equity in favor of the complainant and all the other creditors of the bankrupt, to be paid out of the fund due to his estate; and if there was anything to which those creditors who did not come in were not entitled, Lindsey was, as to that portion of the fund, a trustee for the creditors generally. He took the whole fund, as executor of Colville, in right of his wife, and therefore an account was directed. But the lord keeper refused to hear the discussion as to the particular rights and equities of any of the creditors. When the case came before Lord Guilford, on the master's report, (1 Vern. R. 319,) it turned out that none of the creditors of Colville came in within the year. The real contest in that case was not as to priority of payment between those creditors who came in and those who did not. It was between the creditors, on the one side, and Lindsey and his individual creditors on the other; he having attempted to divert the whole funds to the payment of his own private debts. It was therefore very

properly decided that the fund created by the patent was special assets in his hands as executor, for the payment of Colville's debts; and was not convertible by him to his own purposes. The case of *Spottiswood v. Stockdale*, (Cooper's R. 102,) shows that a composition *deed, though void at law because all the creditors have not signed it within the limited period, is good in equity, if they have actually assented to it and acted under it within the time. The same principle had been previously recognized by Lord Eldon, in the case of *Sadler v. Jackson, Ex parte*, (15 Ves. R. 52.)

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There is another principle, however, which will entitle these complainants to equitable relief in this case; and some of the other creditors may be in the same situation. It was unquestionably the intention of the person who created this trust, that all of his creditors, as well in Europe as in this country, should have an opportunity to accept of the terms offered by the trust deed; and that they should be entitled in that case to their proportion of his property. Those who had notice of the trust in time to enable them to come in within the year, but who neglected or refused to do so, must be considered as rejecting the offer thus held out to them in common with the other creditors. As against them, those creditors who accepted the offer are in equity, as well as at law, entitled to a priority. The others have voluntarily relinquished the provision which was made for them by the trust deed, and have no claim except upon the surplus, if any there should be, which passed to the general assignee under the insolvent act. Those creditors, who would gladly have accepted their proportion of the trust fund upon the terms proposed, but who, for want of notice, or from mistake or accident, were unable to comply with those terms within the year, and who have not done anything since that time inconsistent with the offer held out to them by the creation of the trust, have an equitable right to be let in to share the fund at this time, upon the terms proposed.

1831. A decree must be entered declaring their rights accordingly; and the complainants, and all others who are in the same situation, will have an opportunity, at any time within six months, to come in before the master and establish their claims as creditors, and to comply with the terms prescribed in the creation of the trust. But before they are to be permitted to come in and establish their claims before the master, *they must furnish him with their own affidavits, or other satisfactory proof, that they had not notice of the terms and conditions of, and the actual provisions made for them by the deed, in time to enable them reasonably to accept of the terms offered within the year, or they must show some other satisfactory excuse for not having come in within that time. And any of the creditors, who are entitled to a share of the fund, as well as the trustee and the assignee under the insolvent act, are to be at liberty to controvert those facts before the master, and to show that they are not entitled to come in as creditors, on the principles above declared; or that the amounts claimed by them are not justly due, or that they have received payment, either wholly or in part, out of other funds.
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DIAS v. MERLE AND OTHERS.

Where a party was directed to deposit certain books in the master's office, with liberty to the adverse party to inspect and take extracts from such parts as related to certain partnership transactions, and in obedience to the order the books were deposited in the master's office, with the parts thereof which did not relate to the partnership transactions sealed up, and during a temporary absence of the master, the adverse party, who was inspecting the books, broke open the parts which were so sealed up, and which contained the private memoranda and remarks of the party who deposited the books, in relation to his private business transactions, *it was held*, that this act of the adverse party was a contempt of the court.

It is the ordinary practice of the court, when books are directed to be pro

duced for the inspection of the opposite party, to permit those parts to be sealed up which do not relate to the subject matter of litigation; and courts of record have uniformly protected suitors against an unwarrantable interference of the adverse party with rights of this description, by proceeding against the offender as for a contempt.

1831.

Dias
v.
Merle.

THIS was an application to punish the complainant as for a contempt, committed by him in the master's office; and also to obtain a special order to protect the rights of the defendant in future. Both parties were directed to deposit certain books, in their possession, with a master; with liberty to the adverse parties to inspect and take extracts from such parts thereof as related to partnership *transactions. Certain books of the defendant Merle were deposited with the master, with particular parts thereof, which did not relate to the matters in which Dias was interested, sealed up in the usual form. During a temporary absence of the master from the office, the complainant, who was inspecting the books deposited, broke open those parts which were sealed up, and which contained the private memorandums and remarks of the defendant Merle, in relation to his private business transactions.

July 19th.

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Murray Hoffman, for complainant.

Julius Rhoades, for the defendant Merle.

THE CHANCELLOR. There can be no doubt that the misconduct of the complainant in breaking open the parts of the books which were sealed up in the master's office, was, at common law, punishable as a contempt. (Burrow's case, 8 Ves. 535. *Bateman v. Conway*, 5 Bro. P. C. 84.) Upon my first examination of the revised statutes, I was inclined to think that the section which defines criminal contempts (2 R. S. 278, § 10) had deprived the court of the power of punishing the improper conduct complained of here. But on further examination, I am satisfied this case is provided for, in the second and eighth subdivisions

1831. of the first section of the title relative to "proceedings as
 Dias for contempts, to enforce civil remedies, and to protect the
 V. rights of parties in civil actions." (2 R. S. 534.) It was
 Merle. an abuse of the proceedings of the court; it was also a
 case in which the rights of the adverse party were materi-
 ally involved. While the course of judicial investigation
 frequently requires a party to produce parts of his books
 in which the adverse party has an interest, for the inspec-
 tion of the latter, it may frequently be of great impor-
 tance to the former that his accounts and transactions
 with other persons should not be exposed to the examina-
 tion of strangers, and particularly of an enraged adver-
 sary. Where his books are subjected to inspection, it is
 the uniform practice of the court to permit a party to seal
 up those parts which do not relate to the subject of litiga-
 tion. [*496] *(*Gerard v. Penswick*, 1 Wils. Ch. R. 222. *Cam-
 bell v. French*, 1 Cox's Ca. 288.) And it has been the
 practice of courts of record to protect suitors against any
 unwarrantable interference by the adverse party with
 rights of this description, by proceeding against the of-
 fender as for a contempt.

Although the complainant might not have been aware
 that he was subjecting himself to punishment, as for a
 contempt of the court, by secretly breaking open and ex-
 amining these private entries of the defendant, there can
 be no doubt that he knew he was doing wrong. The fact
 that he had brought in his own books with a part thereof
 sealed up under oath, in the same manner, and that he
 took advantage of the temporary absence of the master
 to effect an improper purpose, are strong circumstances
 against him. Besides, in consequence of a former com-
 plaint against him for making marks, &c., on the books,
 the order had in terms directed that he should only have
 the right to examine the books in the presence of the
 master, even as to those facts in which he was interested.

As this is a case in which the defendant has been put
 to expense for counsel fee, &c., beyond the amount of the

costs in consequence of this unjustifiable act of complainant, an attachment must issue against him, he does within ten days after service of a copy of a bill pay to the defendant Merle, or to his solicitor costs on this application, together with reasonable fees as between counsel and client, to be settled with such costs by the vice chancellor of the court. And to guard against any further abuse of privilege, the complainant is not to be permitted to see any part of the books, except in the presence of counsel and the master, during office hours; and to allow and pay to the master the usual fee for attention a reference, for each day the master is compelled to attend personally on such examination. The parts of the books which have been unsealed must be sealed up by the master, and the complainant must be prohibited from disclosing what is contained therein, to any person and from using any information or extracts obtained therefrom, in any way, without the written permission of the defendant Merle, or the special leave of the court, upon pain of contempt.

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v.
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SAILLY v. ELMORE.

A surety will in equity discharge a surety, on a simple contract, may be set up as a defence to an action against him in a court of law. The court of chancery had originally the exclusive jurisdiction in such cases; but it will not relinquish its jurisdiction because the complainant may have an adequate remedy at law. If a suit at law has been commenced, and the defendant in that suit merely files a bill in chancery to set up a defence of which he cannot avail himself at law, the court may refuse to interfere by way of mandatory injunction; or it may refuse costs to the complainant on the ground of delay. A creditor, without the consent of the surety, makes a valid and binding contract with the principal debtor to give him further time of payment; and if the principal debtor is discharged, the surety is discharged.

1831. So he will be discharged by any arrangement between the principal debtor and the creditor, which operates as a fraud upon the surety; as where the money has been offered to the creditor, and he, without the consent of the surety, requested the debtor to retain it longer. So where the creditor fraudulently colludes with the debtor to conceal from the surety the fact of the non-payment of the debt until the debtor becomes insolvent.

Sailly
v.
Elmore.

But a mere consent of the creditor to a delay because the principal debtor has not the ability to make immediate payment, and without any new consideration, does not discharge the surety.

August 2d. THIS cause was heard on bill and answer. The facts, as admitted in the answer of the defendant, were as follows: In December, 1827, the complainant executed a note to the defendant with M'Cotter & Grant, as their surety, for \$362.50, payable in 90 days. When the note fell due, M. & G. represented to the defendant that it was inconvenient for them to pay the note at that time, and requested him to wait 60 or 90 days longer. The defendant promised to indulge them for the time they requested; and that, in the mean time, he would not call on the complainant for payment; but no consideration was paid, or agreed to be paid, for this indulgence. In July, 1828, M. & G. again requested time, and promised to pay one or two hundred dollars on the note *in a few days. The defendant informed them that he did not intend to press them for immediate payment. The complainant made no inquiries, and received no information that the payment was deferred or that the note was unpaid, until June, 1829, when he was called on for payment. M'Cotter & Grant, who were in doubtful circumstances when the note fell due, were at that time insolvent. Payment having been refused, a suit at law was commenced on the note, and the bill in this cause was filed to restrain the proceedings in that suit by injunction.

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H. Bleecker, for the complainant. The complainant's contract with the defendant was, that if the note was not paid by M'Cotter & Grant when it fell due then he, the

complainant, would pay the note to the defendant. That the complainant signed the note as a mere surety, was known to the defendant. No notice was given to the complainant of the non-payment of the note. It remained unpaid for a year after it fell due. Gross negligence, on the part of the creditor, in securing his debt from the principal debtor, will discharge the surety. (*Duvall v. Trask*, 12 Mass. R. 154. *King v. Baldwin*, 17 John. R. 391. *People v. Jansen*, 7 id. 332.) The complainant in this case was misled by the defendant. The conduct of the defendant induced him to suppose the debt had been paid. (*Bathbone v. Warren*, 10 John. R. 587.) An arrangement with the debtor, which puts the surety in danger of being made liable, discharges the surety, as an agreement with the maker of a note to delay the payment without the consent of the surety. (*Pain v. Packard*, 13 John. R. 174. *People v. Berner*, 13 id. 383. *Powell v. Waters*, 17 id. 176.) Where an actual injury results to the surety from the acts of the creditor, the surety is discharged. *Hunt v. United States*, 1 Gal. C. C. U. S. R. 32, per Story, J. *Reese v. Berrington*, 2 Ves. jun. 543. *English v. Darley*, 3 Esp. N. P. R. 50, S. C. 2 Bos. & Pul. 61.)

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M. T. Reynolds, for the defendant. The complainant has a perfect remedy at law. Courts of law give the same relief in these cases as courts of equity. Mere delay will not discharge the surety. The creditor may lie by and see the *principal debtor go to ruin, without enforcing the collection of his debt, and the surety will not, in consequence of this delay, be discharged, unless he had given the creditor notice to collect the debt from the principal debtor. The bill would have been bad on demurrer. The objection to it can now be taken *ore tenus*. (*Pabodie v. King*, 12 John. R. 426. Fell on Guar. 200, and note.) It was decided in the case of *Reynolds v. Ward*, (5 Wend. R. 501,) that an agreement, without

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1831. consideration, by the creditor with the principal debtor
 Saily enlarging the time of payment of a note, did not discharge
 v. the surety. An agreement with the principal debtor
 Elmore must be valid and binding, and made upon sufficient con-
 sideration, in order to discharge the surety. (*Philpot v.*
Briant, 4 Bing. R. 717, reported in 15 Com. Law. R.
 126.)

THE CHANCELLOR. It is now settled that the same principles, which in this court are sufficient to discharge the surety, may be plead by him as a defence to an action, on simple contract, in a court of law. But as this court had originally the exclusive jurisdiction in such cases, it is no objection to a bill filed here, at this time, that the complainant has an adequate remedy or good defence at law. In the language of Lord Eldon: "This court will not allow itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same, or a similar jurisdiction." (*Eyre v. Everitt*, 2 Russ. R. 382.) If a suit at law is commenced in such a case, and the defendant in that suit unnecessarily files a bill here to set up a defence of which he may now avail himself at law, this court may refuse to interfere by way of preliminary injunction, or it may not give him costs on a final decree. But if he establishes his equitable defence here, this court cannot dismiss the bill for want of jurisdiction.

Where the creditor makes a valid and binding contract with the principal debtor to give him further time of payment, without the concurrence of the surety, it is a discharge of such surety. He will also be discharged by any arrangement or dealing between the principal debtor and the creditor, which operates as a fraud upon the surety. As if the *money had been offered to the creditor at the day it fell due, or afterwards, and he had without the consent of the surety requested the debtor to retain it longer, this would operate as a fraud upon the surety and dis-

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charge his liability. But a mere consent to the delay of payment because the principal debtor had not the ability to pay presently, and without any new consideration, does not discharge the surety. (*Heath v. Key*, 1 Young & Jer. R. 434. *McLemore v. Pewell*, 12 Wheat. R. 554.) [1]

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[1] See Waterman's Am. Ch. Dig. tit. PRINCIPAL AND SURETY. Any valid and binding agreement between the creditor and the principal debtor, or other active interference of the creditor whereby the surety may be injured or subjected to increased risk, or be deprived of, or delayed in the assertion of his equitable claim to pay the debt and become subrogated to the rights and remedies of the creditor against such principal debtor, if it is made or done without the assent of such surety, will in equity discharge him from his liability. *Bangs & Allcott v. Strong and others*, 10 Paige, 11. But mere delay, or a promise of delay, not founded upon a new consideration, or the taking of a collateral security from the principal debtor, without any stipulation to extend the time of payment of the original debt, will not discharge the surety. *Ib.* Vide 3 Paige, 614; 11 Wend, 812, S. C.; 10 John. 597; 4 Lehigh's Rep. 622; 5 *ib.* 547. Although the agreement with the principal debtor is executed by only one of two joint creditors, and without the consent of his co-creditor, it will nevertheless operate as a discharge of the surety, if it has the effect to prejudice the right of such surety to substitution, without his assent. *Ib.* But where such agreement is obtained from the creditor, by the principal debtor, upon the false representation of the latter that the surety had authorized him to make it, and the surety afterwards refuses to assent to the agreement, the creditor will be at liberty to repudiate it; in which case the surety will not be discharged, unless the creditor proceeds to act under the agreement, after notice that it was entered into without the authority of the surety, and that such surety had refused to assent to the same. *Ib.* The creditor may always stipulate with the principal debtor to give him time of payment, upon condition that the surety assents to the agreement, so that the right of the creditor, as against the surety, shall not be impaired. And, in such case, if the surety refuses to assent to the new arrangement, the agreement is void. *Ib.* By joining in a bond, the surety becomes a principal debtor, and the debt is presumed to have been created upon the credit given to the surety as well as to the principal debtor. *Berg v. Radcliff*, 6 Johns. Ch. Rep. 302. Equity will distinguish between principal and surety, though the nature of the security be such as to make them all principals in a court of law. *M'Dowall v. Banks*, 1 Harrington's Rep. 369. When the creditor by contract extends the time of payment to his principal debtor without the consent of the surety, he releases the surety. *Comegys v. Booth et al.*, 3 Stewart, 14. Where a party has given verbal notice to the creditor to sue the principal, to entitle him to a discharge, he

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Sally
v.
Elmore.

If the complainant in this case had established the fact that Elmore had fraudulently colluded with M. & G. to conceal from him the fact of non-payment of the note, until their circumstances became desperate, it would have discharged his liability. Such an arrangement would

must show that by neglecting to sue, an injury has been sustained by him. *Herbert et al. v. Hobbs et al.*, 3 Stewart, 9. And if such notice and injury be shown, it is a good defence both at law and in equity, and without proof of the injury it is no defence in either court. *Ib.* And if such defence be omitted in a suit at law it is waived, and cannot afterward be asserted in chancery. *Ib.* The sheriff having an execution against G. entered thereon a fictitious levy of a slave, as the property of G. when, in fact, there was no such slave in existence, and took from G. a forthcoming bond, with F. and B. as his sureties for the delivery of the slave at a stipulated time. The bond being returned forfeited, and execution having issued thereon, against the principal and the sureties; held, that the sureties could not be relieved in chancery because the levy was fictitious. *Mead v. Figh & Blue*, 4 Ala. Rep. 279. A creditor cannot be compelled to exhaust his remedy against the principal debtor, before he resorts to the surety, unless under peculiar circumstances, rendering it proper that a court of chancery should interfere. *Abercrombie v. Knox*, 3 Ala. Rep. 728. Where property is mortgaged to indemnify a surety in various liabilities, in some of which the mortgagee has joint sureties, there should be a pro rata distribution of the proceeds. *Goodloe v. Clay*, 6 B. Mon. Rep. 236. One surety of a non-resident debtor cannot, by bill and attachment, in chancery, draw from another who is surety for such debtor in a distinct demand, any funds which he may owe the non-resident, to the prejudice of such surety. *Sims & Hollis v. Wallace*, 6 B. Mon. Rep. 410. One of two sureties in distinct demands, cannot attach a fund in the hands of another by bill, and thus leave him without indemnity. *Ib.* When an award is about being made between a principal and one of two sureties, touching certain moneys alleged to have been placed in his hands for the payment of the debt, the other surety will be bound by it when made, or by being present with full knowledge that it is about being made, and not dissenting. *McGehee v. McGehee*, 12 Ala. Rep. 83. When a contract for the sale of land is rescinded by the decree of a court of chancery, the surety of the vendee is not responsible for the value of the use and occupation of the land by the vendee, the surety never having been in possession, or derived any benefit from it. *Elliott v. Boaz*, 13 Ala. Rep. 635. A note signed by one as surety, on condition that another person also signs it as surety, and left with the payee for that purpose, cannot be enforced against the surety, unless executed also by the person indicated as co surety. *Jordan v. Loftin*, 13 Ala. Rep. 547.

thrown him off his guard, and thereby have pre-
l him from securing himself in due season. But
ne complainant instituted no inquiry, and made no
ot to ascertain whether his liability was discharged
erwise. Neither do I understand the answer as in-
g to admit that the defendant agreed to conceal
the surety the fact of non-payment. He promised
o delay proceedings against them, and not to call
Sailly and thus indirectly to enforce the immediate
ent of the demand through him. The creditor was
ound to give the surety notice of the non-payment
note. If there was an agreement to conceal from
omplainant the fact that the note was still due and
d, the complainant should have filed a replication to
swer, and have established such fraudulent agree-
by legal proof. The admissions in the answer do
that length, and they afford no ground of equitable
e to the suit on the note.

complainant's bill must therefore be dismissed,
costs.

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Perry
v.
Perry.



*R. L. PERRY v. P. PERRY.

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common law of this state, the court of chancery had no jurisdiction
ecree a separation between a husband and wife, for cruel treatment,
account of a mere canonical disability.

riage merely voidable is valid for all civil purposes until its nullity
een pronounced by the proper tribunal; but by the common law
entence of nullity, when pronounced, renders the marriage void
the beginning.

rt of the common law of England which renders a marriage con-
absolutely void in certain cases, forms a part of the law of this
; and may be enforced by the appropriate tribunals independent of
tatutory provisions.

elty which entitles the injured party to a decree of separation, is
ind of conduct which endangers the life or health of the complain-
and renders cohabitation unsafe.

1881. Where a right is claimed as existing by the common law, which is incapable of enjoyment except by the direct interposition of a judicial tribunal to give the remedy, if no tribunal has been organized for that purpose by the law-making power we may fairly presume that no such right exists. But if the right is expressly declared by the legislative power without creating or appointing any particular tribunal to administer the remedy, the power must be exercised by some of the existing tribunals of the country.

Perry
v.
Perry.

The 12th section of the act of March, 1824, authorizing the court of chancery to decree a separation from bed and board, on the complaint of the husband, was not repealed in the recent revision of the laws.

July 19th. THE bill in this cause was filed by the complainant against his wife to obtain a divorce *a mensa et thoro*. It stated that the defendant was in the constant habit of intoxication; that she contracted debts, in the name of her husband, for liquors, &c.; that, in her fits of passion and drunkenness, she committed acts of cruelty and violence upon him and his children; that she broke and destroyed his windows and furniture, and that of his neighbors; that on one occasion she attacked the complainant in his sleep, and gave him a blow which wounded his head; and on another occasion she beat his children with clubs, and threw a billet of wood at his little daughter, which wounded the child and endangered its life. The bill also stated that the defendant threatened to poison the complainant, and actually procured arsenic for this purpose, and concealed it in her trunk, and that it was dangerous [*502] *for the complainant or his children to live with her. The defendant demurred to the bill, upon the ground that the court had no jurisdiction to grant the relief prayed for.

J. B. Scoles, for the complainant.

W. C. Noyes, for the defendant.

THE CHANCELLOR. There is no doubt that by the law of England, as it existed at the time of our separation

in that country, and as it still exists there, such conduct charged by the complainant in this bill, if not proved by his own misconduct, would be sufficient to entitle him to a decree against his wife, in the proper court, relieving her from his bed and board. Although the applications to the ecclesiastical courts in England for separation on account of cruelty, are generally on the part of the wife, yet all the writers on the subject admit the right of the husband to institute such a suit. (Oughton, tit. 193. 1 Black. Com. 441. Poynter's Mar. & Div. 209.) In the case of *Kirkman v. Kirkman*, in the common law court of London, in 1807, (1 Hagg. Cons. R. 409,) Mr. Justice Scott pronounced for a divorce from bed and board, in a suit promoted by the husband against his wife, for acts of violence and other cruel treatment on her part. I have before had occasion to say that divorces, such as are only to release the parties from the obligation of cohabiting together, "should never be allowed, except for the protection of the innocent party, and for the punishment of the guilty." The common law has not given to the husband sufficient power over the wife, to render the interference of a court unnecessary in all ordinary cases. But if a separation for cruelty and violence on the part of the wife is to be decreed in any case, the facts stated in this bill seem to present that case. Cruelty which entitles the injured party to a divorce, consists in that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe. (Poynter's Mar. & Div. 209.) If the charges in this bill are true; if this defendant permits her passions to usurp the throne of reason, as to allow her to perpetrate such outrages upon his children; to attack and commit personal violence upon her husband in his person; to break and destroy his property; to threaten his destruction by poison, and even to go so far as to procure a deadly drug for that purpose, not only his health, but his life is in actual danger from her violence. Co-

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1831. habitation with such a wife is certainly unsafe, notwithstanding the powers with which the husband is armed by the common law to restrain the violence of her passions, and keep her in due subjection to his lawful commands. Whatever may be the common law on the subject, the moral sense of this community, in our present state of civilization, will not permit the husband to inflict personal chastisement on his wife, even for the grossest outrage. And no man of feeling would ever think of resorting to such a remedy, except in the heat of passion, if it were expressly given to him by a public statute. It remains to be considered whether this court has any jurisdiction or power to afford the necessary relief to a husband in such a case.[1]

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[1] The court interfered to protect and relieve a wife, who was ill used and insulted by her husband; although he had not beaten her nor forced her out of his house, she having left it to avoid a repetition of the ill usage; and though the husband made an offer to receive her back again, to avoid maintaining her separately, and to elude the justice of the court, it was decreed she should have relief and maintenance according to the fortune of the husband, and it was referred to the master to inquire and report his circumstances. *Jelineau v. Jelineau*, 2 Desau. 45. The court has no power to grant divorces a mensa et thoro, but it has power to decree a separate maintenance. If there were no precedents, the court would make one. *Ib.* The charges of great personal ill usage of the wife, and slander of her character, by the husband, being made out fully, the court decreed alimony. Offers to receive back the wife do not necessarily prevent the allowance of alimony. The court in this case decreed a competent sum to be paid to the wife, half yearly, until, in its opinion, the complainant might safely return to her husband. *Ann Taylor v. W. Taylor*, 4 Desau. 167. Where the husband abused and ill treated his wife, and kept a mistress in his house, under the eyes of his children, the court decreed that one third part of his income, together with a sufficient sum for the board and education of the daughters, should be paid by defendant, for alimony and maintenance, and the children be put under their mother's protection. *Williams v. Williams*, 4 Desau. 183. Where a wife separated from her husband, and returned to him, on promise of reform and better treatment, it is a waiver of his prior ill treatment; but the court received evidence of his prior bad conduct, to aid the presumption of harsh treatment after her return, of which there was no positive proof. Alimony was decreed to the wife, in this case, and she was pro-

It is insisted on the part of the complainant, that, independent of any statutory provision on the subject, this court has the power to decree a separation in such cases;

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lected in living separate from her husband. The husband was ordered to enter into recognizance to keep the peace toward his wife. *Threewits v. Threewits*, 4 Desau. 580. The court of chancery has jurisdiction in all cases of alimony. *Purcell v. Purcell*, 4 Hen. & Munf. 507. To entitle the wife to alimony, cohabitation, name, reputation, and other circumstances, are admissible evidence of marriage. *Ib.* In a controversy with respect to the validity of a marriage, no alimony is due until some matrimonial proof appear, or that it doth some way constare de matrimonio; but wherever a marriage doth appear, alimony should be granted, unless the wife be in fault. *Ib.* 515. The wife is not entitled, by way of alimony, to a third of her husband's estate; but she is entitled to a suitable maintenance, which may be varied according to circumstances, and which should not continue longer than he is willing to restore her to the comforts of bed and board, and to give satisfactory assurances for her enjoyment thereof; which, if she should refuse, the allowance made for her support would, at his instance, be taken away. *Ib.* 571. Where a defendant refused to conform to a decree of the court, with regard to alimony, he was committed to custody till he should perform it. *Ib.* 520. Where a wife filed a bill for alimony, &c., against her husband, and it appeared that he had abandoned her without any support, and threatened to leave the state, the court, on the petition of the wife, granted a writ of *habeas corpus* against the husband. *Denton v. Denton*, 1 Johns. Ch. Rep. 364. Pending a bill for a divorce by a wife against her husband, and before answer, the court will allow a monthly sum to the wife, as alimony, and also a sum to be paid to her, by her husband, toward defraying the necessary charges of the suit, on her part. *Ib.* *S. P. Miz v. Miz*, 1 Johns. Ch. Rep. 106. Where a bill was brought by a wife against her husband for a divorce *a mensa et thoro*, on the ground of cruel usage, and also for maintenance, the court, under the circumstances of the case, decreed a divorce for five years; that the wife during that time should have the custody and care of their child, a daughter; and that the husband should pay a certain sum a year, in half-yearly payments, one half of which to be applied to the maintenance and education of the child. *Bedell v. Bedell*, 1 Johns. Ch. Rep. 604. A decree cannot be made in this court against a husband whose misconduct is the charge for the foundation of such decree, unless he is brought into court to answer the charge; except he absconds, in which case the court will make some provision for the wife, until he returns. *Anonymous*, 2 Desau. 207. The suit for alimony is for a tort, and altogether personal, and of course expires with the death of the husband. *Ib.* This court will decree a separate maintenance during separa-

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that so far as relates to the civil remedies of the parties, it possesses all the powers which are vested in the ecclesiastical courts of England in matrimonial causes.

In *Wightman v. Wightman*, (4 John. Ch. R. 343,) Chancellor Kent certainly did assume a jurisdiction which in England is at this time exercised exclusively by the ecclesiastical courts. In that case he made a decree declaring a marriage void, on the ground that the complainant was a lunatic at the time the marriage was celebrated. And the reasoning of the court in that case goes far towards establishing the doctrine contended for by the complainant here. In *Ferlat v. Gojon*, (1 Hopk. R. 478,) Chancellor Sanford also made a decree declaring a marriage void, on the ground that the consent of the complainant thereto was obtained by fraud and terror, and that the marriage had never been consummated by cohabitation. The decision in the last case is put upon the ground that there is a jurisdiction in the court of chancery in England, concurrent with that of the ecclesiastical courts, to declare

tion only; but has no right to decree a perpetual separation. *Ib.* Where a woman was cruelly treated by her husband, the court decreed an allowance of alimony, proportioned to the husband's fortune, to be paid annually to the wife, till the husband should receive her home and treat her kindly. *Prather v. Prather*, 4 Desau. 83. The infant child was ordered to be left with the mother; the other children to be under the care of the father. The husband to give security. *Ib.* The court will grant a supplicavit, if necessary, in case of ill usage or turning the wife out of doors; to which separate maintenance is incident. *Ib.* A wife ill used, beaten, and driven from home, by her husband, is entitled to the protection of the court, and will be allowed alimony, or the income of a settled property for her maintenance, until her husband receives her home and treats her kindly. *Devall, by prochien ami, v. Devall et al.*, 4 Desau. 79. A ne exeat, which had been granted against the husband, was continued, until the property settled by the articles on the wife was secured. *Ib.* The court will not regard slight circumstances of impropriety of conduct, to raise a presumption against the wife, so as to withhold its aid and protection. *Ib.* A wife having left her husband's house, is not entitled to alimony, unless she makes out a clear case of good conduct on her own part, and bad usage, amounting to the *sævitia* of the ecclesiastical court, on that of the husband. *Anonymous* 4 Desau. 94.

such a marriage void, on the ground of the duress and *fraud; the latter being one of the general grounds of jurisdiction in the court of chancery. In the subsequent case of *Burtis v. Burtis*, (1 Hopk. R. 557,) which was a suit to annul a marriage contract, on the ground of the physical incapacity of the defendant, Chancellor Sanford decided that this court had not jurisdiction in such a case. That the law of England concerning divorces and matrimonial causes, as the same was administered in the ecclesiastical courts of that country, was never adopted as a part of the law of the colony, and therefore did not become a part of the law of this state, at the time of our separation from the mother country.

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That part of the ancient common law of England which rendered a marriage absolutely void, where either of the parties had not the legal capacity to contract matrimony, or where there was in fact no legal consent by one of the parties, the same having been obtained by force and fraud and never afterwards voluntarily acquiesced in, was undoubtedly brought to this country by our ancestors and formed a part of the law of this colony. In such cases, for all the substantial purposes of justice, the courts of common law and of equity in England had concurrent jurisdiction with the ecclesiastical courts. Although the other courts yielded to the courts christian the exclusive jurisdiction to declare the nullity of the marriage by a direct proceeding between the parties, it was rather on the ground of convenience than from a want of power in the court of chancery to grant similar relief to the parties. The court of chancery and courts of common law always exercised the power to declare the marriage absolutely void, whenever the question came before them in any collateral proceeding. (*Betsworth v. Betsworth*, Styles' l. 10. *Riddleson v. Wogan*, Cro. Eliz. 858.) In those cases the sentence of the ecclesiastical courts does not dissolve the marriage, inasmuch as no lawful marriage can have taken place. It merely declares the fact of

1831. marriage to be a nullity. (Poynter, 156.) In the case of
 Perry *Bowzer v. Ricketts*, (1 Hagg. Cons. R. 214,) Sir William
 v. Scott says: "The marriage act declares marriages in such
 Perry. cases to be *ipso facto* void. The sentence of the ecclesiastical court is declaratory only; it does not make them void." In such cases, where the rights of the parties existed *independent of any peculiar remedies which were entrusted to the exclusive cognizance of a particular court, it was competent for the superior courts of the colony to administer such relief as was consistent with their ordinary forms of proceedings in other cases, and such as was proper under the circumstances of each case. But I doubt whether this principle extends to any of that numerous class of cases in which the ecclesiastical courts were in the habit of dissolving the *vinculum* of the marriage, on the ground of some pre-existing canonical disability; such as consanguinity, or affinity, within the prohibited degrees, physical incapacity, &c.

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Chancellor Kent evidently thought some of those marriages were absolutely void, even if no sentence of nullity was pronounced; but in general they are only voidable by the sentence of the appropriate tribunal. Poynter says: "A marriage merely voidable is valid for all civil purposes, until, by a sentence, its nullity has been pronounced; and when a marriage is voidable, on the ground of a canonical impediment only, the sentence of the court is interposed to annul it, as a state in which the parties cannot continue without endangering their souls' health, and causing the profanation of matrimony." (Poynt. Mar. & Div. 154.) In those cases, however, if a marriage *de facto* is annulled by the ecclesiastical court during the life of the parties, it renders it void from the beginning, and bastardizes the issue thereof; but if not so dissolved, the issue are legitimate. (*Elliot & Sugden v. Gurr*, 2 Phil. Eccl. R. 16. *Harris v. Hicks*, 2 Salk. 548.)

Where the right claimed as a common law right is of such a nature that it cannot be enjoyed in any manner,

except by the direct interference of a judicial tribunal to give the remedy, if no tribunal has been organized by the law-making power for that purpose, we may fairly conclude the right does not exist. But whenever the legislature distinctly give the right, without creating or appointing any particular tribunal to administer the remedy, it is fairly to be inferred that they intended to vest that power in some of the existing tribunals of the country. As the right to dissolve a marriage **de facto* which was merely voidable, could only be exercised by the aid of the ecclesiastical court in England, and as no such court was ever organized here, and no other court exercised any such jurisdiction for more than one hundred years, it may reasonably be presumed the right did not exist; and that this part of the law of England was never in existence in this colony. Such a jurisdiction, therefore, cannot now be exercised here, by any court, without the direct or implied sanction of the legislature.

The decision of Chancellor Sanford, in *Burtis v. Burtis*, is therefore entirely consistent with that of his predecessor, in *Wightman v. Wightman*, before referred to, so far as relates to the point actually before the court in the last mentioned case. In the one case, the marriage was absolutely void; and this court, in the exercise of its ordinary jurisdiction, had a right to remove the apparent obstruction to the wife's contracting matrimony with any other person. In the other case, there was a good marriage *de facto*; and the court very properly decided that the power to dissolve such a marriage did not then exist in this state, except by the interference of the legislature.

The principles on which Chancellor Sanford's decision rests, appear to be equally applicable to the case now under consideration. And I conclude that this court has no power to decree a separation between these parties on the complaint of the husband, unless the powers conferred upon it by the 12th section of the act of April, 1824, (Laws of 1824, ch. 205, p. 249,) are still in force, as to this

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case. Such was the opinion expressed by Chancellor Kent, in *Van Vechten v. Van Vechten*, (4 John. Ch. R. 501,) notwithstanding what he had said as to the jurisdiction of the court in matrimonial causes, in *Wightman v. Wightman*.

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The general repealing act of December, 1828, (2 R. S. 779, § 5,) declares that the repeal thereby of any statutory provisions shall not affect any act done, or right accrued, or established, &c., previous to the time when such repeal shall take effect; but every such act or right, &c., shall remain as valid and effectual as if the provision so repealed had remained in force. If I have succeeded in showing that the right *and the remedy, in a case of this kind, were so blended together that the one could not exist without the other, the abrogation of this remedy necessarily destroyed the right. As the acts complained of in this case took place previous to January, 1830, when the repealing act took effect, if the right of the husband to a decree of separation ever existed it must have accrued before that time; and the right may still be enforced, even though this provision in the law of April, 1824, were embraced in the repealing act.

But the counsel for the complainant also thinks he has discovered that the act of 1824, so far as it relates to this subject, is not in fact repealed, and that it remains in full force; subject, however, to the modifications contained in the 11th and 12th sections of the repealing act. The revisers, and probably the members of the legislature who assisted in the revision of the laws, intended to repeal and abrogate this provision, in favor of the husband, contained in the act of April, 1824. Believing this to be the fact, I have carefully examined the several provisions of the repealing law, under a hope of finding some clause which, either in terms or by implication, repeals that provision, and thus effectuates the probable intention of the members of the legislature. But I regret the necessity which compels me to say that the counsel for the

complainant is right, and that the 12th section of the act of 1824 is not repealed.

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This section is found at the end of a local statute, altering the terms of the county courts in some few of the counties. It was probably placed there for the purpose of procuring its passage through the legislature, without comment or examination, just at the close of the session. This singular course, of coupling it with a local act to which it had no relation, in order to get it through the legislature originally, has probably caused it to be overlooked a second time, in preparing the repealing act; and it is thus retained as a part of the existing law of the state, contrary to the probable intention of the legislators who revised the laws. The title of the act gives no intimation that any such principle is embraced in its provisions. The act itself is therefore not set out *by its title in the repealing law, as was done in relation to most of the old statutes which were revised, or were intended to be abrogated and repealed. But the first eleven sections of the act are repealed by a sweeping clause, embracing all statutes and parts of statutes prescribing or altering the times of holding the county courts. The general clause repealing "all statutes and parts of statutes consolidated and re-enacted in the revised statutes, or repugnant to the provisions contained therein," does not reach this part of the act of 1824; because it is not repugnant to any provision of the revised statutes, but was simply intended to be left out of the revision, and to be repealed. It is referred to in the revisers' list of acts "omitted," &c., which was submitted to the legislature near the close of their labors, as a section intended to be repealed, (page 1 & 121 of list:) but by accident it was overlooked in preparing the details of the repealing law. And by the operation of the 10th section of that act, the general law of 1813, relative to divorces, which is repealed by its title, as well as by the operation of the general clause repealing all statutes consolidated and re-

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1881. enacted in the revised statutes, remains unrepealed for
 Grandin all the purposes of this provision in favor of the hus-
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The demurrer in this case must be overruled, and the defendant must put in her answer to the complainant's bill within the time prescribed by the 49th rule. As she has no separate property, no costs are allowed against her.

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*GRANDIN AND OTHERS v. LE ROY & SMYTH.

After a defendant has answered a bill in chancery, and submitted himself to the jurisdiction of the court without objection, it is too late to insist that the complainant has a perfect remedy at law; unless the court of chancery is wholly incompetent to grant the relief sought by the bill.

It is no objection to an application to dissolve an injunction, on bill and answer, that a replication has been filed. But if the testimony has been taken in the cause, the court will order the application to stand over until the hearing on the merits, unless special circumstances render delay improper.

Where the endorsers of an accommodation note lend their names to the drawer, without any limitation or restriction as to the manner in which the note is to be used, he has a right to apply it to the payment or security of an antecedent debt or to sustain his credit in any other way.

August 2d. THE bill in this case was filed to restrain the defendant Le Roy from proceeding at law to recover a draft drawn by I. Field on the defendant Smyth, and endorsed by the complainants. The draft was transferred to Le Roy in security for an antecedent debt of Field; and for which Smyth was also liable. After a replication had been filed to the answers of the defendants, Le Roy applied to the vice chancellor of the seventh circuit for a dissolution of the injunction; but the application was denied with costs. From this decision Le Roy appealed to the chancellor.

CASES IN CHANCERY.

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D. S. Jones, for the appellant.

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J. A. Spencer, for the respondents.

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THE CHANCELLOR. The objection that the complainants had a perfect remedy at law, came too late. The defendant should have taken that objection either by demurring to the bill, or by insisting on it in his answer as a bar. After a defendant has put in an answer to a bill in chancery, submitting himself to the jurisdiction of the court without objection, it is too late to insist that the complainant has a perfect remedy at law; unless this court is wholly incompetent to grant the relief sought by the bill. This point was expressly decided by Chancellor Jones, in *Smith v. Haviland & Field*, *in June, 1827, which is not reported, but of which I have a note. (See also 4 Cowen's R. 727, and the cases there cited.)

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It is no objection to an application to dissolve an injunction on bill and answer, that a replication has been filed. If, indeed, the application is delayed until after the taking of the proofs, the court will not then go into an investigation of the whole merits of the cause on such an application, unless there are very particular reasons which would render delay improper. But the court will in such case order the motion to stand over until the hearing. In this case the motion was denied, with costs. I presume therefore the vice chancellor intended to decide the question on the merits, as presented by the bill and answers.

On an examination of the facts, as they are stated in the bill, I do not think they raise the question, whether an accommodation note made and endorsed for a particular purpose and afterwards negotiated for another purpose by a third person, with notice, or in payment or security for an antecedent debt, can be collected against the endorser.

The complainants allege that they endorsed this draft,

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as sureties merely, under a supposition that it would be discounted at the bank; and that the money was to be laid out in the purchase of produce, to be sent to New York to meet the payment. But they do not allege that Field, or any other person, made any such representation to them to induce them to become the endorsers; or that any fraudulent artifice or device was made use of to deceive them as to the real object for which the draft was intended. On the other hand, they say they have been informed and believe that Field's original intention, in making the draft and procuring their endorsement, was to raise money for the use of Le Roy, and to be applied in part payment of the debt due to him. It is not even alleged that such intention was designedly concealed from them. Their supposition, as stated in the bill, is one which the defendants could neither admit nor deny in the answer, as it was confined to the complainants' own bosoms at the time. It also is one which it seems impossible to establish by any legal proof. If they lent Field their endorsement, without any restriction as to the manner in which it was to be used, and without inquiry, he had a right to use it, in the way he has, to pay or secure an antecedent debt, or to sustain his credit in any other way which was not illegal.

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This case appears to be like that of the *Bank of Rutland v. Buck*, (5 Wend. R. 66;) where the holders of an accommodation note were permitted to recover against the endorsers, although it was received in security for a previous debt. The fact that the bank had refused to discount it, does not alter the case. (*The Bank of Chango v. Hyde*, 4 Cowen's R. 567.)

The order of the vice chancellor must be reversed, with costs; and the injunction is dissolved.

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M'CARTEE v. TELLER AND WIFE.

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A legal jointure, settled upon an infant before marriage, is a legal bar of her dower; and by analogy to the statute, a competent and certain provision, settled upon the infant in bar of dower, to which there is no other objection but its mere equitable quality, is an equitable bar of dower.

To make a mere equitable jointure binding on the infant, the provision should be as beneficial to her, and as certain, as that required in the legal jointure to constitute a legal bar.

The equitable provision, to bar dower, must be a provision to take effect in possession or profit immediately on the death of the husband, and to continue during the life of the widow; and it must be a reasonable and competent livelihood for the wife, in reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the portion received with the wife on her marriage.

An estate for life, or during the widowhood of the grantee, is a base or determinable freehold; and if an adult actually accepts such an estate in lieu of dower, it will constitute a legal bar; but if such an estate is settled upon an infant, who has no legal capacity to consent to an acceptance of such a qualified freehold, it will not bar her dower.

Where the husband entered into an ante-nuptial contract with an infant and her guardian, by which she was to receive a certain annual sum during her widowhood, in lieu of dower, *it was held*, that she was not bound by the agreement, and might disaffirm the same and claim her dower, after the death of her husband.

But by the revised statutes, the distinction between legal and equitable jointures is abolished; and any estate or pecuniary provision made for the benefit of the wife, whether an adult or an infant, in lieu of dower, will, if assented to by her in the manner prescribed in the revised statutes, now constitute a *legal* bar of her dower.

*In February, 1817, Philip Jacobs, aged about 75 years, married Elizabeth Brown, then an infant under the age of twenty-one. By an ante-nuptial agreement, made a few days previous to the marriage, executed by both parties, and also by the general guardian of the infant, it was agreed on the part of the husband, that upon his death the widow should receive an annuity of \$1200, out of his estate, during her widowhood; and should have all his household furniture, and a set of plate, to her own use

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absolutely. It was further agreed that, in case of her re-marriage, the annuity should cease, and that in lieu thereof she should receive the sum of \$1000 in gross; which sums, and the furniture and plate, were declared to be settled on her in lieu of all dower, and all right, title, or claim of dower, which she might otherwise acquire by her marriage. These payments were to be made to her, however, upon condition that she remained chaste during coverture, and contracted no debts exceeding the sum of \$20, for which the husband might be made liable, without his knowledge or consent. And the infant, with the approbation and consent of her guardian, acknowledged herself satisfied with this provision; and agreed to relinquish all claim of dower which she would otherwise acquire in the real estate of which her husband might be seized, at the time of the marriage, or afterwards. Jacobs died in October, 1818, leaving his wife then enciente of a female child, which was born in January, thereafter, and lived about two years. At the time of the marriage of Jacobs, and at his death, he was seized of a large real estate, and was possessed of considerable personal property. A short time before his death he made a will, in due form of law to pass real estate, and thereby, after a great number of pecuniary legacies to other persons, he gave to his wife \$6000; to be received by her in lieu of all dower to which she might by law be entitled out of his estate, and also in lieu of all claims on her part under the marriage articles, if she should be willing to receive that sum in lieu of her dower and of her said claims under the marriage articles. The wife was required by the will to make her election, to take under the will or under the marriage articles, within thirty days after notice of the bequest, and after the death of the testator; *and, if she elected to take the provision contained in the will, she was to cancel the marriage articles, and execute a release of dower in the estate, before payment of the legacy. The testator then disposed of the residue of his estate as fol-

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lows: "Item: It is my will, that if at the time of my decease there shall be any child of mine alive, that then all the rents and profits of my real estate shall be received by the executors hereinafter named, or the survivor or survivors of them, and be applied by him or them to the support, maintenance and education of such child, until such child attain the age of twenty-one years or intermarry; and if from the yearly application of the said rents and profits to the purposes aforesaid, there should be a surplus remaining, the said executors, or the survivor or survivors of them, shall, from time to time, in his or their discretion, invest the same in some safe stock for the benefit of such child, to be paid over to such child at the age of twenty-one years, or on marriage, whichever event shall first take place; and that my said executors, or the survivor or survivors of them, receive for such their trouble and attention, such sums as the law may allow. Item: After the payment of all legacies contained in this my last will, I do hereby give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, to the Orphan Asylum Society in the city of New York, to be applied to the charitable purposes for which said asylum was established; this bequest to take effect immediately after all other debts and legacies are paid, if I should leave no child at the time of my death; or if I should leave a child, then upon the death, intermarriage, or the attaining of the age of twenty-one years by such child. Item: I do hereby devise and bequeath unto my said executors, and the survivor or survivors of them, or such of them as may act in the premises, all my real estate, of whatever nature or kind the same may be, subject to the trusts aforesaid. And it is my will that whenever such child shall attain the age of twenty-one years, or marry, that my real estate be sold by my said executors or the survivors of them, or such of them as may act herein, and the one half of the proceeds thereof paid to my said child, if the said child shall attain the age of

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twenty-one *years or marry. And lastly, I do nominate and appoint my worthy friends, Peter M'Cartee, R. Cunnyngham and J. Anthon, all of the city of New York, to be the executors of this my last will and testament." The will was proved by all the executors, and by the consent of the other executors, P. M'Cartee took the exclusive possession of the real estate of the testator in the city of New York, except two small lots taken by the corporation for the improvement of one of the streets in the city. In February, 1821, the widow of Jacobs intermarried with Teller, her present husband.

In April, 1830, the complainant filed his bill in this cause against Teller and wife, before the vice chancellor of the first circuit, setting forth the above facts, and alleging, among other things, that soon after the death of Jacobs, the complainant was advised by one of his co-executors, that the ante-nuptial contract was not binding on the wife on account of her infancy, and was no bar to her right of dower in the estate of her late husband; that as she claimed her dower therein, the complainant continued to pay her one third part of the rents and profits of the estate for her supposed right of dower, until the first of November, 1821; that after that time he obtained the marriage articles, and submitted them to his counsel, who advised him that they were valid and binding on the widow, and that she was not entitled to dower; that in conformity with the advice of such counsel, the complainant had ever since denied the right to dower, and had refused to pay over to the defendants the third of the rents and profits of the estate. The complainant further alleged in his bill, that the defendants acquiesced in his decision, not to allow the widow her dower, until 1828, when they filed their bill in this court against him, to recover such dower, which suit is still pending and undetermined; and that they had also recently commenced several ejectment suits against the tenants of the complainant, for the purpose of obtaining dower in the premises in the pos-

session of such tenants, in which suits the complainant had been admitted to defend as landlord. And the complainant prayed, among other things, that the marriage articles might be established as binding on the defendants, and be decreed an equitable bar *to the widow's dower; and that the defendants might be decreed to accept of the provision thereby made, in full satisfaction of all claims for dower, &c. He also prayed for an injunction restraining the defendants from proceeding at law against him or his tenants, to recover dower in the real estate of Jacobs, and for general relief. A motion for a preliminary injunction was thereupon made by the complainant, and argued before the vice chancellor, who denied the same, on the ground that the executors had no interest in the real estate under the will; and that therefore the complainant had no right to file a bill for an injunction. From this decision the complainant appealed to the chancellor.

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The following is the opinion of Judge EDWARDS:

This is an application to restrain the defendants from proceeding at law to recover dower, upon the ground that they have filed their bill in this court for the recovery of it, and that the complainant has a defence or offset which he cannot avail himself of at law. A preliminary point has been submitted, whether the complainant has such an interest in the premises in question, as entitles him to call upon this court to issue an injunction. If he has no interest in the premises, he has no right to make any such call. And it is also an established rule, "that if the complainant's right appears to be doubtful, the court always refuses to interfere." (*Eden on Inj.* 233, and the authorities there cited.) If the complainant has any legal right to the premises, it must be either, 1st, as devisee of the property, or 2d, as trustee by the expressed

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terms of the will, or 3d, as trustee by operation of law. As to the first case, as the testator gave his whole estate to his child and the Orphan Asylum, and as there is nothing to create a doubt but that he believed those to be valid devises, there is no room for an inference that in any event he intended that their trustees should have the estate. 2. As to whether the complainant is a trustee by the expressed terms of the will. So far as it respects the child, the trust is terminated by its death. And as it respects the Orphan *Asylum, the court of errors has decided that the complainant was not a trustee for them, but on the contrary, on the death of the child, that the estate was devised directly to them. And the decision against them turned on this point. 3. If the defendant, then, has any legal interest in the premises, it must be as trustee by operation of law, and this is the only remaining question in the case. It is contended, as the devise to the Orphan Asylum was void, and as the whole estate was devised to the trustees, subject to the trusts specified in the will, that the estate necessarily remains in them. But the court of errors has decided that the complainant never was a trustee for the Orphan Asylum after the death of the child; but on the contrary, on the happening of that event, that the testator devised the estate directly to them.

Now as the intent of the trust, as well as of the devises, must be governed by the intention of the testator, it follows that he intended that the trusteeship should cease the moment he intended that there should be nothing left in the hands of the trustee to hold in trust. To suppose otherwise, would be to suppose that he meant to continue trustees without their having anything to hold in trust; and as a trusteeship without a trust would be an anomaly in the law, I do not consider myself as warranted in arriving at any such conclusion. This marks the boundary and limitation of the powers of the trustees, as prescribed by the testator himself, and beyond this the trustees cannot pass. This view of the subject is in

accordance with the opinion of the judge, with whom a majority of the court concurred. For he says in conclusion: "My opinion upon the whole case rests on this ground, that on the death of the child the estate was devised directly to the respondents, and that after that event there were no trusts to execute, those imposed upon them by the testator having ceased."

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If then it is asked what becomes of this devise, I reply, it goes where all other void devises do, to the heirs. The whole fallacy in this case arises from not duly considering the intent of the trust. If it was, as its terms seem to import, that the trustees were to hold the property until others legally took it, then of course the legal estate would still be in the *trustee. But according to the decision of the court of errors, the trust, as gathered from the general tenor of the will, was only co-extensive with the cardinal object which the testator had in view, which was mainly the preservation of the estate for the benefit of the child, and that when that end failed, the trust ceased. The trustee was not placed absolutely in the shoes of the testator, but only to a qualified extent. If the Orphan Asylum could have taken the property, they could have done it without any act of the trustee, as the devise was directly to them. This would of course have put an end to the trusteeship; and as there is not a shadow of ground for presuming that the testator ever doubted the legality of that devise, there is no ground for presuming that he intended that the power of the trustee should be extended; if the devise proved invalid, as the direction which property must take variant from that prescribed by law, must be governed by the will of the testator, and as he has failed to give any other valid direction, it is now left undisposed of by him, and must take the usual direction prescribed by the laws in such cases. Under these views of the case, the motion for an injunction is denied.

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The following is the opinion of Judge EDWARDS, in the cause of Teller and wife v. M'Cartee :

The main question in this cause is, whether the ante-nuptial contract, entered into between the said Elizabeth, was of such a nature as to be binding upon her, she being an infant at the time it was entered into.

No rule of the common law is better established than that the contracts of an infant are voidable at his election. This rule is as binding in a court of equity as in a court of law. Prior to the English statute relative to jointures, all ante-nuptial contracts entered into by infants were, I apprehend, voidable; and the cases since that time, in which they are held to be obligatory, are confined to those which are within the equity of that statute, or, in other words, to cases in which, by a decree for a specific execution, the provisions *of that statute will be complied with. The leading case upon this subject is that of *Drury v. Drury*, which was decided by the house of lords. This case proceeded upon the assumption that the husband covenanted to charge his estate with the payment of the annuity which he agreed to leave his intended wife, then an infant. Although the covenant, in this particular, was ambiguous, yet it was urged upon the court that such was the import of it, and the court certainly yielded to that impression, as it made a specific decree to that effect. Roper, in commenting upon it, considers it as settling these positions, viz: 1. That a covenant to make a jointure, which would be good in law, if it had been actually settled, will have the same effect in equity; 2. That it is not necessary that the jointure should be of real estate, as the literal construction of the statute requires; if from the terms of the instrument the heir is bound, and the widow may have the thing settled as agreed, to be so secured out of lands. (1 Roper, 473.) He also says: "If, however, the jointure be defective in any of the particulars which have been adjudged necessary to bring the provi-

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sion within the intent and meaning of the statute of jointure, it will not, it is presumed, bar the infant." It is true that there are many cases in the books, rendering obligatory ante-nuptial contracts, which do not contain those requisites; but, with two exceptions, they are all cases in which the wife was of age when she entered into the contract. That an ante-nuptial contract is not binding upon the infant, unless within the equity of the statute, although secured upon lands, from the uncertainty of its taking effect on the death of the husband, was also decided in the case of *Caruthers v. Caruthers*, (4 Bro. C. C. 500.) The first of the two cases above referred to, is that of *Jordan v. Savage*, in 3 Bac. Abr. 717. This was a covenant to settle copyhold lands on the wife, in lieu of her customary dower in the same lands, and it was decided to be a bar of the dower. The case, however, is too imperfectly reported to afford full and satisfactory information of the ground upon which it proceeded. The other case is that of *Williams v. Chitty*, (3 Ves. 545,) where it was decided that a settlement before marriage, on an infant, of leasehold property, was a bar to her dower. *No reasons are given by the chancellor, and his opinion is only implied by overruling an exception to a master's report. These cases are too bald to afford satisfactory ground for shaking a fundamental rule of law.

According to these views, the case then resolves itself into this question: Was there such a covenant, on the part of Philip Jacobs, as would, if carried into execution, have brought this case within the equity of the statute, or, in other words, would have enabled this court to have conveyed to her such an estate as would comply with the requisitions of the statute relative to jointures? Philip Jacobs covenants for himself, his heirs, executors, &c., that out of his estate, his heirs, executors, &c., shall pay annually the sum of \$1200, in half-yearly payments, to the said Elizabeth, during widowhood, in lieu of dower. There is no provision that any part of his estate shall be

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charged with the payment specifically; but it is a mere naked covenant to pay, and this court could not compel the heirs to settle any of the real estate upon the wife, without travelling beyond the covenant. It is not, therefore, such a covenant as would enable the court to compel the heirs to make such a provision as the statute requires, and consequently is not valid.

There is, I apprehend, another objection to this contract. The covenant on the part of Jacobs is upon condition, among other things, "that she shall not contract any debt over \$20, without his knowledge and assent." A violation of this provision would of course have left her without any provision at his death. In that event, therefore, there would be no jointure; for jointure is a provision to take effect on the death of the husband. Now, although the authorities sanction a condition subsequent, compatible with the continuance of the jointure for life, yet no case can be found to sanction the principle that it may be defeated by an act previous to the death of the husband, and above all, I apprehend that a court of equity (the guardians of the rights of infants) would never sanction so unreasonable a condition. And if this contract was not binding at its inception, it could not be rendered so by the accidental circumstance of the *estate or annuity not being defeated by a violation of the condition upon which it was granted.

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The remaining question is, whether the defendant has assigned dower out of the rents. It is alleged in the bill that he did. The defendant admits that he paid her one third of the rents, from time to time, for her dower, but under a mistake as to her legal rights, and denies that he assigned her dower. The testimony proves that he admitted her right to dower, and made payments of one third of the rents in satisfaction of it. Is this, then, an assignment of dower?

It is fully established by authorities, that "as dower is a title created by law, out of particular estates and inter-

ests," it allows the widow to accept of rent out of the same estate, by some assignment, without deed. (And. R. 288. Hob. 153. Co. Litt. 34, b.)

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It appears to me that the assignment of one third of the rents, by the defendant to the wife of the complainant, for her dower, was as completely made as it could be without deed; and as this was not necessary, and as the assignment was accepted by her, I am of course of opinion that she is entitled to the rents so assigned.

I shall therefore decree that the defendant account for so much of the rents received by him, as the wife is entitled to for her dower, and that it be referred to David Codwise, one of the masters, to take and state the account, and that the complainants be at liberty to examine the defendant under oath, relative to the premises before the master.

B. F. Butler and *John Duer*, for the complainant. The complainant being in the possession of the premises sought to be recovered, is entitled to the aid of this court, for the purpose of establishing an equitable bar to the claim of dower, even though it be conceded he has no title to the premises. The cases cited in *Eden on Inj. 233*, were cases where a party out of possession applied for an injunction to stay waste, &c. They are not applicable to cases where the party is in possession under a claim of title, and applies to stay a suit at law, and the subject matter is within the cognizance *of the court of chancery. Equity has concurrent jurisdiction as to legal, and exclusive as to equitable bars of dower. (*Jones v. Powell*, 6 Johns. Ch. R. 194.) The defendants ought to have been put to their election, whether to proceed at law or in chancery. (*Eden on Inj. 27. Rogers v. Vosburgh*, 4 Johns. Ch. R. 84. *Livingston v. Kane*, 3 id. 224.) By proceeding to argument in the cause in chancery, they have elected to proceed in the latter tribunal; and the suit at law should be restrained.

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1831. The complainant, as acting executor, has a valid and subsisting title to the premises in controversy; absolute at law, although subject, in equity, to a resulting trust in favor of the heirs at law of Philip Jacobs, if any there be.

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It was contended below, and has been so held by the vice chancellor, that, on the death of the child, all the interest and estate of the executors, and all their control over the estate ceased. This was not the decision of the court of errors in the case of *M'Cartee v. Orphan Asylum Society*, (9 Cowen, 437;) nor was any opinion to this effect expressed by any of its members. 1. The question was not before the court, whether the devise to the corporation being void, the estate continued in the trustees after the death of the child. The sole questions were: 1. Whether the devise to the corporation, in the event of the death of the child, was or was not a direct devise? And, if it was, 2. Whether the corporation had power to take under such a devise? It being determined that the devise was *direct*, and that the corporation had no power to take, the cause was at an end. It would be unreasonable to suppose that the court intended to go further, and to decide a question not raised by the case, and not argued by the counsel. It is important to confine the decisions of the court of errors to the precise case and points before them. This rule is applicable to every court of dernier resort. The expressions of Judge Woodworth (9 Cowen, 505) refer to the intent of the testator, and express the state of things which would have existed, in case the corporation had been capable of taking. To illustrate both, he speaks of the ulterior devise as having actually taken effect. But that he did not intend to state the actual condition and rights of the parties, *is evident from the manner in which he speaks of the estate having vested in the corporation, when the result of his opinion was, that the estate did not, and could not, so vest. Judge Sutherland states the same idea, but in such a manner as to avoid this.

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Under the will of P. Jacobs, the legal estate in the

premises vested, on the birth of the child, in the executors. The birth of the child was, however, a condition precedent; without it the executors would have had no estate, because the devise, if there was no child, was direct to the Orphan Asylum. But on the birth of a child, the estate fully vested in the executors, without entry. (6 Cruise, 9, § 14.) But the executors did in fact enter. It was admitted by all in the case of *M'Cartee v. The Orphan Asylum*, (9 Cowen, 437,) that the estate vested in the executors, and continued so vested in them, at all events, until the death of the child. (See opinion of Chancellor Jones, in the case last cited, 9 Cowen's R. 467, 502; of Woodworth, J. id. 506; and of Stebbins, Sen. id. 516.) The character of this estate in the executors was a fee, subject in equity to the trust described in the will; and if the limitation over to the Orphan Asylum had been to parties competent to take, then, both at law and in equity, such estate in fee would have been liable to be defeated by the death of the child. That the estate was in fee, is apparent from the words "all my real estate," &c. (*Jackson v. Merrill*, 6 Johns. R. 191, and cases there cited. *Lambert's Lessee v. Paine*, 3 Cranch, 97.) The executors were to receive rents and sell. This implies a fee. (*Jackson v. De Lancy*, 13 John. R. 537. 6 Cruise, 264, § 72 to 74, tit. 38, ch. 11.) This was the opinion of Chancellor Jones. (9 Cowen, 502.) This fee was, in equity, subject to the trusts specified in the will; but as they could only be enforced in equity, such subserviency to those trusts did not affect the legal character of the estate. Nor did it qualify the perfection of the legal estate. There was, however, another provision in the will which did affect and qualify the character of the fee, i. e. the limitation over, in the event of the death of the child, to the Orphan Asylum. If that corporation had been capable of taking, the estate devised to the *executors would have been defeasible at law, i. e. liable to be defeated on the death of the child. It would have been so, because the

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ulterior devise, although the limitation of a fee on a fee, would have been good by way of executory devise. It was to take effect within the period allowed by law. But even if the Orphan Asylum had possessed a capacity to take, the possibility of its taking on the happening of the contingency, would neither have given an estate in the corporation, nor have diminished the quantity of the estate in the trustees, though it would have affected its quality. It was a mere possibility coupled with an interest, which they might have released, or extinguished, or bound in equity by contract; but which could not be granted or transferred by any common law conveyance, because not an estate. (1 Preston on Estates, 75, 76.) Then as to the trustees. Their estate, instead of being a fee simple in the highest sense of the word, was, by force of this limitation over, supposing it to be good, reduced in quality to a determinable or qualified fee. It might continue forever, (i. e. if the child lived,) and therefore a fee, (1 Prest. 482;) but as there was a possibility that it might not continue forever, it was only a qualified fee. These fees are treated of by Preston, vol. 1, p. 430 to 435: "It is a quality of these estates, that though they may continue forever, they may be determined by some act or event, expressed on their limitation, to circumscribe their continuance, or enforced by law, as bounding their extent." Preston refers to this head of determinable fees the leasing of estates in fee, subject to executory devises. (Co. Litt. 18, a. in § 11. 4 Kent's Com. 9, and cases there cited.) The qualified, base, or determinable fee, held by the trustees, was an estate on a condition subsequent, and on that species of condition subsequent, called a limitation, or a condition in law. (2 Bl. Com. 155 to 157.) As if the Orphan Asylum had been capable of taking the estate, it would, on the death of the child, have instantly vested in that corporation, without any entry or act on the part of the heir, or of any other person. But as the Orphan Asylum had no capacity to take, and as the limitation over was therefore

void, and failed to take effect, the question arises: What became of the estate *of the trustee on the death of the child? It is supposed by the vice chancellor to have ceased, and reverted to the heirs of the testator. We contend that it remained in the trustees, and not only remained but became absolute and indefeasible at law. The legal estate was not made to depend on the continuance or validity of the trusts, as is erroneously supposed by the vice chancellor. It is as well settled as any other proposition of the law, (until R. S.) that an estate, if granted or devised to trustees, continues in them, though the particular trusts fail; and that it cannot and does not, by reason of such failure, go to the heir at law. Hence the whole doctrine of resulting trusts in favor of the heir. Every such case is a proof that the estate of the trustees continued. Chancellor Jones repudiated the idea that the estate of the trustees ceased, (9 Cowen, 502;) and he cites *Doe v. Copestake*, (6 East, 328.) As to this point we cite, *Burgess v. Wheate*, 1 Eden, 177, and 1 W. Black. 123, S. C.; *Winlay et al. v. King's Lessee*, 3 Peters' R. 383.

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The estate could not revert to the heir of the testator, because, by his devise to the executors, the testator parted with all his estate, and there could be no reversion, nor a possibility of a reverter. (4 Kent's Com. 349. Co. Litt. 34, a. b. Seymour's case, 10 Coke's R. 97, b. *Ld. Mansfield in Burgess v. Wheate*, 1 Eden, 229. 2 W. Black. 165.) There is but one case where there is even a possibility of reverter, after granting the whole estate; and that is the case of a *conditional fee*. (4 Kent's Com. 49, 10, 12.) If we consider the estate of the executors as a determinable fee, the result will be the same. (1 West. 440, 470. 2 Black. Com. 156, 157. Co. Litt. 206, b. 4 Kent's Com. 9.) So also if we consider it as an executory devise. If the executory devise is void, or is defeated by the failure of the event on which it is vested, the estate of the first taker becomes absolute, and there is no reverter to the right heirs of the testator.

1831. (*Jackson v. Ball*, 10 John. R. 19. *Jackson v. Staats*, 11 John. R. 338, 351. 2 Preston on Estates, 441 to 445. 2 Bl. Com. 152, 157.) In *Jackson v. Ball*, p. 351, Spencer, J. held that if the estate over does not take effect, because there is no person *in esse* to take, although the event had happened *upon which the estate was to vest, it became absolute in the first taker, and did not go to the heirs of the testator. The executors having no beneficial interest in the estate, does not prevent the applicability of these principles, as we are now discussing a mere legal question; and no injurious consequences will result from these principles, as the estate having been intended as a trust, a trust results in equity to the heirs at law of the testator. (Saunders on Uses and Trusts, 216, 218. 1 Cruise, 475, 477, tit. 12, ch. 1, § 38. 4 Kent's Com. 300, 301. *Hobart v. Comitiss, Suffolk et al.*, 2 Vern. 644. *Lloyd v. Spillet*, 2 Atk. 150. *Nash v. Smith*, 17 Ves. jun. 29. *Burgess v. Wheate*, 1 Eden, 177.) But such resulting trust can only be enforced by bill in equity in favor of the heir, &c. (*Finlay et al. v. King's lessee*, 3 Peters' R. 383. *Doc v. Copestake*, 6 East, 328.) There is a distinction between conditions in law and a limitation. An estate, given so long as one pays rent, ceases upon the non-payment of the rent; but express words must be used in such cases. So an estate, liable to be defeated by a future contingency; if the words are mere words of contingency, they are construed words of limitation; and upon the happening of the contingency, the first estate ceases. And where a fee is once given, and the limitation over is void, the estate of the first taker becomes absolute. The case here is to be considered in the same manner as if there had been no devise to the Orphan Asylum, and that upon the death of the child, no disposition of the estate had been made.

The co-executors of the complainant are not necessary parties to the bill. The complainant is in sole possession. The same objection was made against entering the appeal

to the court of errors in the case of *M'Cartee v. The Orphan Asylum*, and was disregarded. Nor is it necessary that the *cestuys que trust* should be made parties; the trustee may bring the suit in his own name. The party is not required to state the nature of his claim, where he spreads out in the pleadings all the facts upon which it is founded. The complainant has shown enough to entitle him to the aid of the court. He has a legal estate in the premises; and a party who can defend his possession successfully has a remedy in chancery. The complainant *is entitled to an injunction, because two suits are brought by the widow in relation to the same subject matter; one in equity and one at law. And the jurisdiction of this court having attached, it will stay the proceedings at law.

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The complainant relies with confidence upon the marriage articles which were executed by Mrs. Teller previous to her marriage, with the assent of her guardian, as an equitable bar to the claim of dower now asserted; whilst on the part of the defendants it is insisted that they are absolutely void, upon one or more of the following grounds: 1. Because Mrs. Teller was an infant at the time of her coverture; 2. Because the provision made for her is not charged on a freehold estate, so as to be capable of specific execution as a legal jointure; and 3. Because the provision is in itself unreasonable and uncertain. That the statute of jointures embraces infants as well as adults, so that a settlement before marriage, otherwise valid, cannot be set aside on the ground of the infancy of the wife, at the time of its execution, or of the marriage, was definitively settled in England, by the decision of the house of lords, reversing the decree of Lord Northington, in the great case of *Drury v. Drury*. It may be true, as Mr. Eden (the grandson of Lord Northington) has asserted, that great doubts have been entertained as to the propriety of this decision, but that its controlling force, as an authority, has ever been questioned is not pre-

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 M'Cartee by this decision the important question which it involved
 v. was finally settled. That the law of that case is, and for
 Teller. more than half a century past, has been the law of Eng-
 land, it is impossible to doubt; and such being the fact,
 no stronger proof could well be given of the difficulties
 of the defendant's case than the attempt of the learned
 counsel to show that it is not also the law of this country.
 That it was a deliberate and solemn determination, by the
 court of ultimate jurisdiction, of the very question under
 consideration, is not denied; but the learned counsel are
 dissatisfied with the reasoning on which it proceeded, and
 considered the arguments of Lord Hardwicke and Lord
 Mansfield as weak and unsatisfactory. We think there
 would be no difficulty in repelling these strictures, and
 [*526] *in vindicating the opinion of these illustrious men from
 the censures of the learned counsel; but we have no
 courage for such a discussion, and shrink from the pre-
 sumption which such a vindication would imply. We
 content ourselves with saying that, in our judgment, the
 question, whether the decision of the house of lords was
 properly made, is not open for the consideration of this
 court as such. That decision was pronounced in the
 year 1762. From that time it became the law of this
 state, as a colony. It continued so to be the law when
 we became an independent state; it has never since been
 changed by the legislature; and with entire respect, we
 deny the authority of this court to change it now. We
 submit, with great confidence, that a decision of the
 house of lords before the revolution is as conclusive evi-
 dence of the law, and as such as binding upon the con-
 science of this court, as any recent decision of our own
 court of errors.

The authority of *Drury v. Drury* (2 Eden, 60) being
 admitted, there is an end, it seems to us, of all questions
 as to the validity of the marriage articles, as an equitable
 jointure. The two cases, in all essential circumstances,

are absolutely similar; nor is it possible to state a distinction between them, which a slight examination will not show to be groundless. The learned counsel are exceedingly mistaken in the assertion that the only question decided by the house of lords was, that the infancy of the wife is no objection to a jointure under the statute. The provision for the wife in *Drury v. Drury* was not a legal jointure; it was not a settlement of such an estate in lands as the statute requires, or indeed of any estate at all. It was a mere covenant, on the part of the husband, binding his heirs, executors, &c., to pay to his wife, after his decease, a certain annuity, during her life, in lieu and satisfaction of her dower. It is very clear that such a provision could not have been pleaded in bar to an action of dower, and that, from its nature and character, a court of equity was alone competent to give it effect. It is true that the sole question on which the opinion of the judges was required, related to the construction of the statute, and for this plain reason, that, as equity follows the law, if it were held that a legal jointure is valid, notwithstanding *the infancy of the wife, the same rule would be adopted in equity, in reference to those provisions intended as a satisfaction of dower, which, as not embraced by the terms of the statute, it is the exclusive province of that court to enforce.

The decision of the house of lords, therefore, was, 1. That the statute extends to infants as well as adults; and 2. As a consequence of this, that the infancy of the wife was no objection to an equitable jointure, otherwise valid.

His honor the vice chancellor, in his written opinion, does not deny that the provision for the wife in *Drury v. Drury* was an equitable jointure, and that its validity as such was the question determined; but between that case and the present there exists, he asserts, a distinction so material as to render it quite inapplicable as an authority. He says that, in *Drury v. Drury*, the covenant of the husband charged his estate with the payment of the

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annuity, and that the house of lords evidently adopted this construction of the articles, "since they made a specific decree to that effect;" whereas, in the present case, the agreement of the husband "is a naked covenant to pay, and is not, therefore, such a covenant as would enable the court to compel the heirs to make such a provision as the statute requires, and consequently is not valid." His honor, therefore, means to decide that an equitable jointure, where the wife was an infant, is not valid, unless it be so charged upon the lands of the husband, that upon his death the wife may compel the heirs to convey to, & settle upon her such an estate in the lands as the statute requires; in other words, to convert the equitable provision into a legal jointure; and he evidently supposes that such were the terms and import of the decree in *Drury v. Drury*. On this subject, (we speak with much respect) the learned judge was probably misled by the observations of Mr. Roper, to which he refers. It is plain that Mr. Roper was much dissatisfied with the ultimate decision in *Drury v. Drury*, and was anxious to confine its authority within the narrowest limits. He was thus led to give a construction to that case which is not justified, either by the reasoning of the counsel, the opinions of the judges, or the terms of the decree; which *is not sanctioned by a single case, or even dictum of a judge; and which is directly repugnant to numerous authorities.

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It is not necessary to the validity of an equitable jointure, that it should be charged upon lands at all; and this is conclusively shown by the authorities to which Lord Hardwicke refers, (2 Eden, 66, 7, 8,) and by many cases that have since occurred. (See Clancy, Hus. & Wife, p. 223, a. 227; *Corbet v. Corbet*, 1 Sim. & Stu. 612.) The general rule is that which Mr. Clancy states: That a court of equity will execute any terms "for a married woman, without regard to the nature of the property, as out of trust estates, leasehold, copyholds, or out of the funds, and hold them to be a bar of dower, if the intention ap

urs to have been such." (Clancy, 223.) Nor is the provision for the wife rendered insecure or precarious, because it is not made a lien upon the lands of the husband, nor any specific fund set apart for its satisfaction, so, if the property left by the husband is insufficient for that purpose, this would in equity be considered an exception, and the widow would be remitted to her dower. She cannot therefore be injured, since she is certain either to have the intended provision made good out of the estate of her husband, or to be restored to her dower; and this is one of the reasons given by Lord Hardwicke himself, in *Drury v. Drury*, in support of his opinion, (2 An, 68.)

That the law is as we have stated in the case of adults, the vice chancellor admits, but he denies that it extends to infants. He admits that in two cases to which he had been referred on the argument, and in which an equitable jointure, not charged on freehold estate, was held to be a bar of dower, the wives were infants; but for reasons which we frankly confess appear to us very singular, he entirely rejects the authority of these cases, and dismisses them with the observation that "they are too bald to afford satisfactory ground for shaking a fundamental rule of law." This last observation seems to us somewhat perplexing. What is the fundamental rule of law to which his honor refers? Does he mean the rule that the contracts of infants are not binding? This can hardly be; this rule, so far as it applies to a settlement, legal or equitable, in bar of dower, on an infant feme, is not entirely shaken, but overturned by the decision in *Drury v. Drury*, the authority of which his honor himself professes to admit. Does he then mean that it is a fundamental rule of law, that an equitable jointure on an infant is not valid, unless so charged upon lands as to be capable of specific execution as a jointure under the statute? If so, where, we would ask, is this rule to be found? Where is the evidence that it exists at all? In what case was it

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established? We produce two express decisions in which this supposed rule was entirely disregarded, and its existence denied. Can a single one be produced in which it was followed? His honor says that the case of *Jordan v. Savage*, which he cites from 3 Bac. Abr. 717, is imperfectly reported. We perceive no imperfection in the report of the case in 2 Eq. Ab. 102. The reasons of the chancellor are not indeed given *in extenso*, but there is a clear and explicit statement of the material facts, and of the points decided. It is remarkable that this very case, which his honor treats as of no authority, is one of those on which Lord Hardwicke, in *Drury v. Drury*, placed his main reliance. (2 Eden, 66.) He even seems to have taken pains to show that the decision was entitled to peculiar weight, from the eminent abilities of the chancellor (Lord King) by whom the decree was made.

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We find it still more difficult to acquiesce in the reasons of the vice chancellor for disregarding the case of *Williams v. Chitty*, (3 Ves. jun. 545,) which seems to us to possess all the requisites of an authoritative decision. In that case, the settlement intended as a jointure was of leasehold property and of stocks, and if valid, it was admitted that the freehold estates of the husband were entirely discharged. Upon the death of the husband, the widow claimed her dower, upon the ground that she was an infant at the time of the settlement, and this claim was resisted by the children. The master reported that the widow was not entitled to her dower; in other words, that she was bound by the settlement. To this report she excepted, and the exception was argued in her favor by the most eminent counsel of the day, who, upon *several grounds, (one of which was that the settlement did not bind all the lands,) sought to distinguish the case from that of *Drury v. Drury*. After stating their argument, the reporter says that the lord chancellor was satisfied that the widow was under age at the time of the settlement, "but disallowed the exception, without hearing the

counsel for the children on that point." The reporter adds: "He also thought the second question," (which related to another point,) "very clear."

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In the opinion of the vice chancellor this case deserves no regard, because "the reasons of the chancellor are not given, and his opinion is only implied by his overruling the exception." We do not understand this; it would be as reasonable to say that the opinion of a court of errors is only implied by their affirmance of the judgment of the court below. It is upon exceptions to a master's report that the vital questions of a cause frequently arise and are finally decided; and the disallowance of an exception, it seems to us, is an express declaration that the exception is wrong, and the report is right. True, the chancellor gave no reasons, and it is evident that he deemed them unnecessary; but it is a strange and novel ground for denying the authority of a decision, that the points decided were deemed by the court too clear to require argument or discussion. The reasons, however, of the chancellor, are evident on the face of the report. The great effort of the counsel for the widow was to distinguish the case from that of *Drury v. Drury*. The chancellor must have thought the cases not distinguishable; in other words, the distinctions on which the counsel relied, were in his judgment immaterial. The truth is, the case of *Drury v. Drury* was meant to establish the general rule, that as the infancy of the wife does not affect a legal jointure, so it forms no objection to an equitable provision, by way of jointure, which is otherwise valid. Upon any other supposition, a large portion of the reasoning, both of Lord Hardwicke and Lord Mansfield, and most of the authorities to which they refer, would be inapplicable. If this rule is to be understood with the limitation which the vice chancellor supposes, it lies upon the defendants to show how and when the exception was introduced and established.

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There is no difference whatever, in their legal operation

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and effect, between the covenant of P. Jacobs in the present marriage articles, and the covenant of the husband in *Drury v. Drury*. That, like the present, was a general covenant to pay, and neither created nor professed to create a specific lien on any portion of the estate. It was not pretended on the argument that it was susceptible of any other construction; still less, that it enabled the court to convey, or to compel the heirs to convey to the wife such an estate in lands as the statute requires, nor can we imagine the source of the error into which the vice chancellor has fallen, when he says that a "specific decree to that effect was actually made by the house of lords." The report in Eden omits to state the decree; but in Brown's parliamentary reports, (3 Bro. P. C. Toul. ed. p. 502, 3,) it is given verbatim, and seems to have been drawn with great care and accuracy. It directs in substance that so much of the personal estate of Sir Thomas Drury should be set apart, and vested in trustees, as would be sufficient to secure to his widow the annuity of £600, to which she was entitled under the articles; and further, that after one of the appellants, named in the decree, (probably the youngest child,) should attain the age of twenty-one years, the widow should be at liberty to apply to the chancellor to have the annuity charged upon, and secured by, and out of the real estate of the said Sir Thomas."

We perceive no mention here of any such conveyance or settlement of a legal jointure as the vice chancellor assumes to be necessary, and as we understand him to say was actually directed; all that the decree proves is, that in the opinion of the court, the real as well as the personal estate of Sir Thomas Drury was liable to make good to his widow the provision to which she was entitled, and might be applied, in the discretion of the chancellor, for that purpose. And can it be doubted, we would ask, that all the property, real as well as personal, of Philip Jacobs, at the time of his death, was equally liable to

make good his covenant? And if his widow had not forfeited her annuity by her subsequent marriage, *can any reason be given why this court might not make a decree, in substance, the same with that in *Drury v. Drury*, for securing to her its punctual payment? It is true that in England this decree could not have been made, had not the court adopted the opinion that the husband, by his covenant, intended to charge or bind his land, and, for the sake of the argument, let it be admitted that the present marriage articles contain no evidence of such an intention. The answer is obvious. It is not necessary in this country that such an intention should appear on the face of the agreement. The law supplies the defect, and by its general provisions creates and imposes that charge upon land, which, in England, so unreasonably depends upon the will of the party. It happens, however, that the covenant of Philip Jacobs would be sufficient to charge his lands even under the law of England, and its terms are in that respect far less equivocal than those of the agreement in *Drury v. Drury*. His covenant is, that the annuity should be paid out of his estate, thus treating his whole estate as a fund for its satisfaction. It is well settled that these words mean all the estate, real as well as personal, and if in a devise they are sufficient to render the lands liable for the debts, we see no reason why the same construction should not be given to them in a covenant. It thus appears in the result, as we stated in the commencement, that between this and the case of *Drury v. Drury* there is not a semblance, a shadow of distinction.

It is next insisted that the marriage articles are not in this case a bar of dower, because the provision intended for the wife is uncertain and precarious, inasmuch as it is liable to be forfeited by her acts during the coverture. This objection is also considered by the vice chancellor as fatal, and it is made by him one of the grounds of his decree. We trust the following observations will be deemed a satisfactory reply.

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1. We admit that an equitable jointure to be valid must be certain, and (to adopt the language of the defendants' counsel) "that it must vest in possession or profit immediately from the death of the husband;" but we insist that this condition is fulfilled in the present case, since by the terms of the *articles the widow was to be entitled to the annuity from the death of the husband, in other words, her interest vested on his death. The question therefore is, what is meant by a certain provision? or more properly, what is the nature of the uncertainty which renders a provision in lieu of dower so precarious as not to be binding on an infant?

The leading case on this subject is that of *Caruthers v. Caruthers*, (4 Bro. C. C. 499;) and we refer to it as a decision which illustrates very clearly the meaning of the rule. The settlement, intended as a jointure, was of an estate for life, to the widow; but this, from the terms of its creation, was not to vest on the death of the husband, but on the expiration of another life estate granted to a third person in the same premises. It was uncertain therefore from the nature of the estate, not only whether it would vest in possession on the death of the husband, but whether it would vest at all, since its doing so depended on the contingency of the wife's surviving the intermediate tenant for life, who, in point of fact, it appears from the report, was still living at the death of the husband. The settlement as a bar of dower was declared void, and the sole ground of the determination was the uncertainty that we have pointed out. The emphatic words of the master of the rolls are, "*non constat*, that the estate will ever be hers (the widow's) in possession."

The rule as deducible from this and the subsequent case of *Smith v. Smith*, (5 Ves. 189,) is therefore this, that a jointure, legal or equitable, is void for uncertainty, when, from its nature, it is doubtful whether it will ever take effect in possession; that is, when its vesting depends on a contingency independent of the will of the party.

We submit, however, with entire confidence, that such an estate or provision is not uncertain, because it may be avoided or defeated by the acts of the wife herself. It is not uncertain, because she may prevent it from vesting, or determine it when vested; for the loss of the jointure is, in such cases, her own fault, and does not result from the contingent nature of the estate itself. Thus, it is well settled that an estate, *durante viduitate*, is a valid jointure, even under the statute, (Vernon's Case, 4 Co. R. 2; Dyer, 317, A. S. C. ;) *for it is an estate for life, unless the widow choose to determine it. The annuity, in the present case, is of this character; but neither the vice chancellor nor the counsel has stated this as an objection. We apprehend, however, that an estate, during the widowhood of a third person, would be clearly void, and even if so limited as to vest in possession on the death of the husband, it would still be void, from the uncertainty of its continuance. Yet the only difference is that the duration of the wife's estate depends, in the one case, on her own will, and not in the other; and this observation is sufficient to show that there cannot be much force in the distinction taken by the defendants' counsel, between a condition for avoiding the jointure during the coverture, and one by which it may be subsequently defeated.

The vice chancellor, however, thought otherwise, for it is upon this distinction he seems to have laid the stress of his opinion. After declaring the provision to be void, from the uncertainty of its taking effect on the death of the husband, he adds, "that no case can be found to sanction the principle that a jointure may be defeated by an act previous to the death of the husband." The learned counsel goes still further, for he not only declares that no such case is to be found, but "that it is impossible that such a decision can be made."

Now let it be admitted that no express decision on this point is to be found; that such conditions have been

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frequently inserted in marriage settlements, it is hardly possible to doubt, and the absence of cases may therefore be owing to the fact that no counsel has deemed it expedient; on this ground, to question their validity. In this, as in many other instances, because there is no case, it does not follow that such is not the law; but that upon principle, the law was deemed so clear, that it would be fruitless to deny it. Recurring then to principles, is there any difference in reason and good sense, so far as this question is concerned, between a condition precedent and subsequent? A condition to prevent the estate from vesting, and one by which it may be subsequently defeated? The objection in both cases is, that the condition renders the jointure uncertain; but whether *the condition be precedent or subsequent, that uncertainty equally exists, and the answer, therefore, which is admitted to be conclusive in the one case, must be equally so in the other; namely, that the jointure is not uncertain, unless the wife chooses to defeat it. It is certain, if she wills that it shall be.

But although there may be no adjudged case to sanction the principle that a jointure may be defeated by the acts of the wife during the coverture, it so happens that the principle is sanctioned by a much higher authority—that of the legislature itself. It doubtless escaped the recollection of the vice chancellor that the 11th section of the statute contains an express provision that the consent of a married woman to her ravisher works a forfeiture of jointure as well as of dower. (1 R. L. 59.)

Again; the adultery of the wife is, and for centuries past has been, a forfeiture of dower; but until the late revision of the statutes, the forfeiture did not, by law, extend to a jointure, yet it cannot surely be doubted that a condition to that effect would have been valid in a marriage settlement, since it will hardly be pretended that a jointure must be even more certain than the dower which it is intended to bar. If we are not greatly de-

ceived, it will be found, by looking at the precedents, that this is a usual provision in marriage articles. These observations are sufficient to show that there is no such general rule, as is insisted, that a jointure cannot be valid where it is liable to be defeated by the acts of the wife, during the coverture. Whether it may not be rendered void, in some cases, by the peculiar nature of the conditions annexed, is a different question. The condition, which is made a special ground of objection in the present case, is that which restrains the wife from contracting any debt to the amount of \$20, during the life of her husband, without his consent, and for which he might be made accountable. It is said that this condition is unjust and unreasonable, and that the provision which is made to depend on its observance is consequently void. We deny both premises and consequence.

*The condition is not unreasonable, if it be reasonably interpreted. We apprehend that no court would construe it as restraining the wife from the purchase of those necessities which the husband might omit to supply, and which her own condition, or that of her family, might require. It is not correct to say that the condition must extend to necessities, because for these only could the husband be made accountable. The husband, by sanctioning the debts of his wife, even for necessities, may frequently give her a credit, the limits of which it is difficult to fix, and which it is in her power greatly to abuse. It was to prevent an abuse of this character, we cannot doubt, that the provision was introduced; and thus interpreted, it seems but a fair and reasonable check on the probable extravagance of a young woman, who, by her marriage was to be raised to sudden affluence from a state of absolute poverty. It was doubtless thus understood by the guardian, whose peculiar duty it was to watch over the interests of his ward, and who signed the articles in her behalf.

Admitting the condition to be as unreasonable as the

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counsel insist; admitting, that from its nature, a breach was almost certain, and therefore that, morally speaking, it was impossible to be performed, or that it imposed a restraint inconsistent with the relation of husband and wife, and with the rights and duties flowing from the marriage contract; what is the consequence of those admissions? Not, as we apprehend, that the provision is dependent on the condition, but that the condition itself would be void. Such is the general rule, where the condition annexed to a grant, gift, or estate of any kind, is impossible, inconsistent, or illegal; (*Brown v. Peck*, 1 Eden, 140; *Bradley v. Peixotto*, 3 Ves. jun. 324;) and no branch of equity jurisdiction is better established than that which enables the court in such cases to relieve against a forfeiture. To sum up briefly the argument on this part of the case: If the condition was fair and reasonable, then it was the duty of the wife to perform it, and if she incurred a forfeiture by a breach, the loss of her equitable jointure was to be imputed to her own fault, and not to the uncertainty of the provision itself. If the condition was *unreasonable and illegal, then the court of chancery, if applied to, would have secured to her the annuity, discharged of the condition.

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Supposing the marriage articles to be an equitable bar, the next inquiry is whether the widow's right of dower was revived by the will of her husband, P. Jacobs. Did Philip Jacobs, in his will, intend to restore to his wife her right of dower, so as to give her an election to take either her dower, or the annuity under the articles, or the gross sum of \$6000 in lieu of both? His right to do this is not disputed; and if the will affords evidence that such was his intention, that intention must prevail. We deny that the will is fairly susceptible of this construction.

When we look at the extent and value of the testator's real estate, we see at once that it is in a high degree improbable that he could have intended to give to his widow the election which is supposed. He could not be igno-

rant that the dower would very greatly exceed in value both the annuity under the articles, and the pecuniary bequest of the will, and consequently that it would be certainly taken, if the right to take it were given. Where an election is given there always is, or is supposed to be, such an equality in value between the different objects, as to render doubtful the ultimate choice. To give an election between a legacy of \$3000 and one of \$1000, or between an estate for life and the fee in the same lands, would be absurd. The absurdity would be almost as striking in the present case, and therefore the construction which involves it ought not to be adopted unless necessary.

That such is the necessary construction of the will is not pretended. Even the learned counsel speak only of implication, and the implication, if it exists, is remote and doubtful. The testator bequeathed to his wife \$6000, "in lieu of all dower to which she might be by law entitled, and also in lieu of the marriage articles;" and he then directs that if she accepts the bequest the marriage articles shall be cancelled, and she shall execute a release of her right to dower. Now, giving to this language all the force of which it is susceptible, it goes no farther than to show the opinion *of the testator, that possibly the right of dower might still subsist, but certainly evinces no intention to revive it, if barred. On the contrary, so far from showing that the testator meant that in any event his widow should take her dower, it is his evident design that all claims to it on her part should be finally extinguished. The peculiar phraseology of the will is susceptible, however, of a different and still more satisfactory explanation. The legal right of dower still existed, for the marriage articles created only an equitable bar.

It is therefore true, that the widow was by law entitled to her dower; and to put an end even to the possible litigation, a release was very properly required. Again; if

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1881. the \$6000 were accepted, the marriage articles were to
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The next clause of the will (which is in truth a part of the same paragraph) removes even a possible doubt as to its true construction, and the real intentions of the testator. It is in these words: "And it is my further will, that my said wife shall make her election to take under this, my last will and testament, or under said marriage articles, in thirty days after she may receive notice of this bequest, after my decease."

What is the widow, if she elects, to take under the will? Clearly the bequest, that is, the \$6000, of which she was to receive notice; for it would be absurd to suppose that the testator meant she might elect to take under the will both the legacy and her dower, when the one had been expressly declared to be in lieu of the other. The widow's election is therefore, in terms, confined to the pecuniary bequest and the provision of the marriage articles, so that all supposition that the testator intended that in any event she might take her dower, is excluded.

[*540] *It is next insisted that the complainant has waived the marriage articles, and that his acts, in effect, amount to an assignment of dower, by which he is concluded. The two questions of waiver and assignment are in themselves distinct, and will with most convenience be separately considered.

There is no dispute as to the principal facts on this part of the case. It is certainly true that the complainant, shortly after the death of the testator, believing the

marriage articles to be invalid, admitted the right of the widow to take her dower; that he concurred with her in some legal proceedings, in which her right of dower, though certainly not decreed, was recognized; and that, for some years in succession, he paid to her a portion of the rents received by him from the real estate of the testator, on account of her dower; but we deny that by any, or all of those acts, the marriage articles were, or could be waived, so as to restore the widow to the rights which they were intended to bar; because the complainant was acting as a trustee under the will of Philip Jacobs, and Mrs. Teller had full notice of the trust. His first act of recognition or acquiescence was shortly after the death of the testator, and during the life of the child, and even the last payment of rent was long before it had been decided that the express trusts of the will had ceased. It is well settled that the legal effect of the transactions of a trustee, with a person who has notice of the trust, depends exclusively on the powers of a trustee as such. If the acts are authorized by the trust, they are valid; if otherwise, they are void; nor is the person chargeable with notice ever permitted to allege their validity. The widow knew that the complainant was a trustee, and dealt with him as such. She knew of the will of her husband, and that the complainant was acting under it. She knew, therefore, that it was not in his power to give her any rights in the estate of her husband, which she did not already possess, and that his recognition of her claims could only be valid so far as the claims themselves were just. If she received the rents on *account of her dower, knowing that she was not entitled, she was guilty of a fraud. If she, as well as the complainant, acted under a mistake as to her rights, then it is her duty to unite in correcting the error, as soon as discovered; for it would be as fraudulent in her to retain the moneys after such discovery, as it would have been to receive them originally, knowing that she was not entitled.

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1831. Now what is the answer of the defendant's counsel to these positions? Do they deny the law to be as we have stated? No; but they assert that the "complainant ought not to be considered a trustee; that he claims the property as absolute owner, and therefore ought to be bound by his own acts." With much respect to the learned counsel, we must be permitted to say that, in our judgment, these assertions are not simply gratuitous, but directly opposed to the evidence before the court. The express trusts of the will, it is true, have ceased; but it does not therefore follow that the complainant's character of a trustee has ceased, or that he has in this, or any other suit, ever set up such an allegation. There is still a resulting trust for the heirs at law; and whether there are, or are not any persons to enforce the execution of the trust, neither is, nor can be known to this court. So far as is known to the court, the complainant is, and always has been, acting in the plain exercise of his duty as a trustee, in defending and preserving the estate for the benefit of those who may be finally entitled.

The acts of acquiescence and recognition, on the part of the complainant, took place under a mistaken view of his rights and duty as a trustee, and cannot, therefore, in equity, be alleged against him. It is a mixed case of ignorance of fact and of law; for, although he had notice from the will of the existence of the marriage articles, he had no knowledge of their contents, and acted under a false opinion of their invalidity. It is a novel doctrine to us, that a person may not be relieved in equity, on the ground of ignorance of his legal rights; and still more so, that he is to be concluded by admissions which such ignorance could alone have prompted. The cases are numerous in which even the most *solemn acts, such as releases and conveyances, have been set aside on the single ground that the party executing was ignorant of his legal rights; (1 P. Wms. 259; 3 id. 315; Mosely, 364; 1 Ves. 567; 2 id. 310; 2 Mer. 354; 1 Mad. 60;)

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and whatever doubts may have been entertained in some of these cases, till now it has never been supposed that the mere admissions of a party, under such circumstances, could be relied on as creating or establishing a right not before existing. The case of *Storrs v. Barker* (6 John. Ch. R. 166) does not conflict with the authorities we have cited. It merely shows that a party is not permitted to allege his own ignorance, in order to defeat an equitable right which he has himself created. That doctrine has no application here. If the marriage articles are valid, there is no equity in the widow's claim.

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The acts of the complainant are not a waiver of the marriage articles, because a contract of this description, and under seal, could not be released by parol, and because an estate, legal or equitable, in lands, cannot be created by parol, with the exception of some cases of a resulting trust. The marriage articles extinguished, in equity, the widow's life estate, to which, as her dower, she would have been entitled. All that she retained was a naked legal title; the whole beneficial interest was gone. We submit that she could not re-acquire the interest thus lost, unless by the devise of the husband, or a re-conveyance after his death, from them in whom the beneficial interest was vested. Even a conveyance from the trustees could not have had this effect, since it would have been void on its face, as a manifest violation of their trust. To hold, therefore, that the marriage articles are set aside by the subsequent acts of the complainant, would be to give to these acts the effect of passing to the widow an estate in lands of which she was not before possessed; thus making the acts *in pais* of a single trustee of more efficacy than a conveyance executed by them all. And lastly, admitting that it was competent to the trustees to waive the marriage articles, as such waiver would necessarily impair their joint title, the consent of all would clearly be requisite; as much so to a waiver as to a conveyance.

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*Passing the question of waiver, it is next insisted that the acts of the complainant amount to an actual assignment of dower, and many authorities are cited to show that such an assignment once made is conclusive. We do not deny that an assignment of dower may be made by parol, and that rents may be assigned as well as lands, but certainty is essential to the validity of every assignment, whether by writing or parol, of land or of rents; and by this we understand to be meant, that the lands or rents assigned shall be clearly defined and specified, so as to give the widow a plain title to the possession of the one and the receipt of the other. To assign dower, is to put the widow in possession of it. The assignment is a satisfaction of her claims, and bars her rights in all property not included in the assignment. The assignment must therefore be certain and notorious, in order to afford adequate protection to the terre-tenatus of the lands which it does not embrace. There can be no difference, in this respect, between an assignment of rents and of lands. The lands out of which the rents are to arise, and the rents which she is to receive, must be specified. The assignment must give her an estate in the rents as in the lands, and must therefore create such a privity between her and the tenant, as to enable her to enforce the collection or recovery of the rents, to which she is entitled in her own name, and as her own property. An agreement, therefore, not of the tenants, but of the heir or other owner of the lands, that he will pay to the widow a certain proportion of the rents, to be received by him, is no assignment, for it creates no privity, and gives her neither possession nor title to either the lands or the rents. A contrary doctrine, it is obvious, would be most prejudicial to the widow herself. Since an assignment is of itself a satisfaction, the widow would lose all remedy against the lands, and be compelled to rely on the sole responsibility of the person with whom the agreement is made. Such an agreement, so far from being an assign

ment, is in truth directly the reverse ; it is an arrangement to prevent an assignment, and a consent on the part of the widow not to enforce it so long as the agreement is performed. If these remarks are correct, their application *to the facts of the case is obvious and conclusive. There has been no specification of lands or rents ; no privity created ; no change of possession or of title ; so that the pretence of an assignment falls to the ground. In addition to the authorities cited by the defendant's counsel, we refer the court to Co. Litt. 34 b. 35 a.

Again ; we deny that an assignment once made is conclusive in the sense in which that rule is understood by the defendants' counsel. It is doubtless true, that where the right of dower is certain, the propriety of the assignment once made cannot afterwards be questioned ; but it does not appear from the authorities to which the counsel refer, or any other, that the title itself may not be questioned, or that a party having made an assignment may not be relieved, where he can show that no title existed ; and the authorities, we suspect, must be very clear and decisive that are to obtain the sanction of this court to such a doctrine. We speak with some confidence that there is no case to prove that an assignment, of itself, creates a title where none before existed ; on the contrary, the first resolution in *Vernon's case* (4 Co. R.) seems to establish the opposite doctrine. It was there decided that an assignment must be of lands of which the widow is dowable ; thus, as we understand the case, clearly making the validity of the assignment dependent on the right. See also the case of *Turner v. Sturgess*, (Dyer, 91 a.) Suppose an assignment by the heir, in ignorance that the widow was barred by a settlement ; or by a purchaser, not knowing that she had released to the heir, or that other lands had already been assigned in full satisfaction ; or by either to a person not in fact the wife, or who had forfeited her right by living with her adulterer ; according to the doctrine of the counsel, an indefeasible estate

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for life would thus be acquired without conveyance, and the sources of the title would be fraud on the one part and ignorance on the other. We deem it unnecessary to pursue the argument further.

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If the widow can be restored to her election to take under the will the pecuniary bequest of \$6000, it can only be done according to the established principles of equity, on the *condition that she account for the moneys she has already received. Strictly speaking, she has no right to the intended bounty of the testator, but has lost her title by her neglect to assert it within the period which the will prescribes. If she is relieved against the forfeiture, it can only be on the ground that she, as well as the complainant, acted in ignorance of her rights, and omitted to claim the legacy because she thought herself entitled to dower; but if she is to be relieved from the consequences of this mutual error, so must the complainant be. If she asks equity, she must do equity; she can claim no more than to be placed in the same situation in which she would have been, had she elected to take the bequest within the 30 days which the will appointed, when she would have received from the estate \$6000, and no more; but she will be placed in a much better situation, if this sum is to be decreed her now, and she is also allowed to retain the moneys she already has. This will be not to fulfil but to defeat the intentions of the testator, by giving her from the estate a much larger sum than he meant she should receive. Whether moneys voluntarily paid under a mere ignorance of law are recoverable, is not the question. The complainant is not seeking such a recovery; but can the widow conscientiously claim to recover the whole legacy, without a deduction of those moneys which she has already received from the testator's estate, and to which she had no title? And, if she applies to the equity of the court, must she not submit to the rules which equity and conscience prescribe? If the widow take under the will, she must perform the will; if

she claim the testator's bounty, she must do so within the limits that he has prescribed.

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R. Bogardus and *D. B. Ogden*, for the defendants. If there be any doubt which way the decree ought to be, the complainant is not entitled to an injunction; and if, for any reasons, the injunction should not be granted, the decision of the vice chancellor ought to be affirmed. The complainant cannot file his bill, unless he shows some right to the property in controversy; and he must state that interest with precision. (Mitf. Pl. 40.) None is shown here. If he has any, then Anthon *and Cunnyngham, his co-executors, have an equal and joint right with him, and should have been made parties to the bill.

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Here the trustees have no interest under the will; in no event were they to be the objects of the testator's bounty. Provision was made to compensate them for their services. The fee vested not in them, but in the unborn infant. All the right they have, is to receive the rents and profits, and apply them according to the direction of the will. The intention of the testator was that the fee should vest in the Orphan Asylum, and to divest upon the birth of the child; and if the child died, then the devise of the fee was made by the will direct to the Orphan Asylum. If there is any devise to the executors, it is contained in the clause devising the estate to them, subject to the trusts declared in the will; and as there were no trusts, it was not necessary to give them the fee, merely to collect and apply as directed the rents and profits. The authority given to executors to sell does not carry a fee. The true construction of the will is, if the child is to be considered as such in the womb, that it vested the fee, either in the child, or, if not in the child, then in the Orphan Asylum until the birth of the child. If the child was born and lived, the executors were only to have an authority to sell. The question in the court of errors was, whether the executors held in

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trust, or whether the devise was direct to the Orphan Asylum. Chancellor Jones held it was a trust, and directed a conveyance to the Orphan Asylum. The court of errors decided that it was a direct devise to the Orphan Asylum, upon the death of the child. If so, there was an end of the trust in the executors. The testator intended the fee should vest in the Orphan Asylum upon the death of the child under twenty-one; and the Orphan Asylum not being competent to take, the fee descends to the heirs at law, like all property undevised, and in like manner as if no devise had been made; but the estate does not go to the heir as a resulting trust. The mistake of the counsel for the complainant is in supposing that the executors ever had a fee at all.

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The contract made before the marriage, between Philip Jacobs and the complainant, Elizabeth, is not a settlement, *nor a jointure, within the act, either legal or equitable, so as to bar dower, unaccepted by the widow after the death of the husband. And if such a contract would bar an adult in her intended husband's estate, it will not bar the widow, she being an infant at the time the contract was made. (1 Cruise, 195, ch. 1, and the authorities referred to. 1 Roper, Hus. & Wife, 473, 476, 480, 485.) A marriage contract will neither bind an infant, nor a feme covert. Whether a jointure, settled upon a married woman under age, was within the act of 27 Hen. 8, was the question in the case of *Drury v. Drury*. There, a majority determined that it was, if all the requirements of the statute were complied with. That, however, is a balanced case; it was decided in 1762. The law since upon this point has not been considered as settled. In the case of *Wilson v. Lord Harewood*, (18 Ves. 275,) it is stated by the lord chancellor that Lord Thurlow expressed himself in favor of the opinion given by Chancellor Northington, in the case of *Drury v. Drury*, which was against the validity of such a jointure. This court is not bound by that case. The house of lords considered

the question as affecting the keeping up of families. Chancellor Northington considered it as one of right and wrong. All the authorities, since the decision in *Drury v. Drury*, (2 Eden, 60,) are against an infant's being bound by articles in relation to her own estate, not confirmed by her after twenty-one. The case of *Drury v. Drury* was decided as a mere jointure under the statute. Before the statute of 27 Hen. 8 was passed, great difficulty was experienced in barring estates of dower. Uses and trusts were invented to accomplish this object. The case of *Drury v. Drury* is not an authority beyond the case where the jointure of the infant is secured upon a freehold estate, or where the wife has the right to have it so settled. (1 Roper, Hus. & Wife, 473.) It is a settled rule that no woman under age can absolutely bind herself by a contract or agreement to part with her freehold estate, or her interest in another's freehold property; and title to dower falls within this rule. (1 Roper, Hus. & Wife, 477, 479, 480, 2.)

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The complainant having become the agent and receiver of the widow in collecting and paying over to her a share of the *rents, cannot now dispute her right to the same. All within the consideration of a marriage contract, and none others, can set it up. (*Bradish v. Gibbs*, 3 John. Ch. R. 523, 550. *Osgood v. Strode*, 2 P. Wms. 255.) The complainant, not being within the consideration, cannot set up the contract in bar of the widow's dower. And the court has a right to presume that the widow was induced to re-marry by the complainant's statement to her that she was entitled to dower, by which re-marriage she forfeited her annuity; and to permit the complainant now to set up the marriage contract against her, would be permitting him to commit a fraud upon her.

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It is by no means admitted, if the contract in its inception should have been binding, that the parties could not waive it; nor do we understand the counsel as contending that such, or any other contract, cannot be waived by

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the parties to it and in interest, if they think proper so to do. The principles of a waiver are too well settled in equity to be at this day disputed. It then remains to consider what has been done by the parties to establish a waiver.

1. The will, when the rights of the widow and the moral obligations of a husband are considered, must be taken as opening the question of dower. (1 Cruise, 133, sec. 21.) A widow has not only a civil, but a moral right to dower.[1] Thus, Sir Joseph Jekyll says: "The rela-

[1] Dower is a legal right, and whether it be claimed by suit at law or in equity, the principles respecting it are the same. *Mayburry v. Brien*, 15 Peters, 21. On a joint tenancy at common law, dower does not attach. Ib. The mere possibility of the estate being defeated by survivorship, prevents dower. Ib. If the husband, being a joint tenant, conveys his interest to another, and thus destroys the right of survivorship, his wife will not be entitled to dower. Ib. By the common law, dower does not attach to an equity of redemption. Ib. A woman is not dowable of a momentary seizin. Ib. So, where the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person to secure the purchase money in whole or in part, dower cannot be claimed as against rights under the mortgage. Ib. There must be a beneficial seizin in the husband in order to entitle the widow to dower. Ib. Nothing short of record evidence is sufficient to divest the wife of her right to dower. *Tomlin v. McChord's Rep.*, 5 J. J. Marsh. Rep. 185. The widow is not entitled to dower in lands, of which the husband was not beneficially seized during the coverture. *Oldham v. Sale*, 1 B. Mon Rep 76. If, therefore, there be a sale of land, the husband, by a parol executory contract, during infancy and before marriage, and after marriage, at full age, such sale be confirmed by a conveyance, the widow is not entitled to dower. Ib. At common law, the right to dower could not be waived or lost by an agreement in lieu of dower made previous to marriage. *Gould v. Womack*, 2 Ala. Rep. 83. When lands which have been mortgaged are devised to the widow of the mortgagor, and she has not dis-sented from the will, by which she is also entitled to other estates, she has no equitable claim to dower against the mortgagee. *Inge v. Boardman*, 2 Ala. Rep. 331. A wife's right of dower attaches on the real estate of her husband, as soon as there is a concurrence of marriage and seizin. *Seel v. Howard*, 3 Barb. S. C. Rep. 319. Such right of dower will not be affected, or prejudiced, by any act of the husband subsequent to the marriage, or by any judgment afterwards recovered against him. But it is liable to be defeated by any subsisting claim or incumbrance, in law or

tion of husband and wife, as it is the nearest, so it is the earliest, and therefore the wife is the proper object of the care and kindness of the husband; the husband is bound

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quity, existing before the inception of the title and which would have defeated the husband's seizin. *Ib.* (Vide 4 Kent's Com., 2d ed., 50; 1 N. Y. R. S. 742, § 16.) Previous to assignment, the right of dower of a married woman, is a right resting in action only. She can neither convey nor assign it; and has no estate in the land. *Scott v. Howard*, 3 Barb. S. C. Rep. 319. The right to dower being in itself a clear legal right, an intent by a testator to exclude it, or that it should be relinquished, must be demonstrated by express words, or by manifest implication. *Leonard v. Steele*, 4 Barb. S. C. Rep. 20. If a widow having an estate in dower marry, her husband, and those claiming under him, have a right to the enjoyment of the premises, during the existence of the marriage. *Doe v. Brown*, 5 Blackford's Rep. 309. (Vide 2 Kent, 184.) If after such marriage, the wife be divorced a vinculo matrimonii, the estate is thereby restored to her. *Ib.* (Vide 2 Pick. Rep. 316, 8 Conn. 541.) Where a settlement of the husband's real estate upon his wife is set aside, she is entitled to dower, if she has survived him; and it is not too late to make the claim after a decree for the sale of the settled estate, for payment of the husband's creditors; but she takes, subject to incumbrances on the estate existing prior to the marriage. *Davidson and Simpson v. Graves*, Bailey's Eq. Rep. 268. Dower ordered to be assessed, by allowing the widow one third of the interest for seven years, on the net value of the whole estate, after payment of prior incumbrances. *Ib.* If the husband before marriage, or in conjunction with the wife after marriage, execute a mortgage, the widow can only have her dower, subject to such mortgage; and if the mortgage be foreclosed, and a sale made, the widow's rights are barred except as to the surplus, after satisfying the mortgage. *Hartshorne v. Hartshorne*, 1 Green's Ch. Rep. 349. If the purchaser of the equity of redemption take an assignment of the mortgage, the debt is not thereby merged or extinguished, and the widow is entitled to bar dower in the equity of redemption only. *Ib.* A widow has a right to ask, in equity, part of a fund in lieu of dower, where that fund has been produced by the sale of her husband's lands, which were subject to her dower, and increased, by being sold clear of that incumbrance, with her approbation and consent. And where she has assigned such a claim, her assignee will succeed to her rights. *Maccubbin v. Cromwell*, 2 Harr. & Gill, 443. On the correction of an endowment of the widow, of all one tract, instead of a third of each tract, she, or the owner of the other tracts, shall pay the other the difference between the rent of the tract she held, and one third of all whereof she was dowable. *Wood v. Lee*, 5 Monroe, 55. Before the statute of uses, neither the wife of feeffe to uses, nor the wife of cestui que use, was entitled to dower in the estate so held. *Stevens v. Smith*, 4

1831. by the laws of God and man to provide for her during
 M'Cartee life, and after his death, the moral obligation is not at an
 V. end," &c. If the will does not, by express words, it cer-
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J. J. Marsh. 65. A court of chancery cannot allow a part of the purchase money in lieu of dower, when the estate is sold, unless by consent of all parties interested. *Herbert v. Wren*, 7 Cranch, 370. Where, on a bill for a foreclosure, the widow of the mortgagor was made a party, and by her answer, submitted to the court, it was held, that she was entitled to the use of one third of the surplus moneys arising from the sale of the mortgaged premises, after satisfying the mortgage debt, as her equitable dower; and to her costs to be paid out of the other two thirds. Her costs were not to be charged on her dower fund. The court directed the one third of the surplus to be put out at interest by the register, and the interest to be paid to the widow. *Tabele v. Tabele*, 1 Johns. Ch. Rep. 45. Though a widow's remedy is prima facie at law, and the dower a mere legal demand, yet, on the allegation of impediments thrown in the way of her proceeding at law, the court of chancery can assume jurisdiction and give her relief for her dower. It will relieve the widow as it relieves an infant. *Swaine v. Perine*, 5 Johns. Ch. Rep. 488. Defendant in a writ of dower may defeat the claim of dower by showing that he holds under a title superior to that of demandant's husband. *Hugley v. Gregg*, 4 Dana, 88. The widow of a tenant in fee, conditional at common law, is entitled to dower, although the tenant died without having had issue. *Milledge v. Lamar*, 4 Desau. 637. Dower ordered to be assessed by the master out of the proceeds of lands sold, and how the different parties to contribute. *Miller v. Cape*, 1 Desau. 110. Compensation for dower reported by the master in lands, ordered to be sold. *Ex'r of Clifford v. Clifford*, 1 ib. 115. A woman having given up her right of dower by the terms of a marriage settlement, and that settlement having been set aside because not recorded in time, she shall be restored to dower in all her husband's lands. *Ward v. Wilson*, 1 ib. 401. A testator leaves larger provisions for his wife in lieu of dower. The widow considered as a purchaser, and shall not abate, but take a preference over all specific legatees and devisees. *Loock v. Clarkson*, 1 Desau. 471. *Stewart v. Ex'rs of Clarkson*, 1 Desau. 500. A widow, waiving her right of dower for the benefit of a legacy, which is afterward swept away by the debts of the estate, may revive her right of dower. *Gist v. Heirs of Cattell*, 2 Desau. 53. The widow of a deceased partner is not entitled to dower in lands purchased with the co-partnership funds, and held in the names of all the partners. *Ex'rs of Richardson v. Ex'r of Wyatt*, 2 ib. 471. The right to dower accrues upon the death of the husband, but the course of our decisions has been to date the running of the statute of limitations, not from the accrual of the right, but from the accrual of the right of action for its assertion; so that the statute does not begin to run until there is a possession in some one ad-

tainly does by implication, recognize her right to dower in her husband's estate; and that a person may take by implication, cannot be questioned. To show that the wife

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verse to the claimant of dower. *Richard v. Talbird*, 1 Rice's Eq. Rep. 158. A claimant in this court who establishes her right to dower against a purchaser in possession, is also entitled to an account of the third of the rents and profits of the lands for the time he has been in possession. *Ib.* A testator bequeathed to his wife five hundred dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require." He also gave her what household goods she might need, and after bequeathing pecuniary legacies to his grandsons, he directed his executors to sell his farm and moveables within a certain time. The farm was sold for \$6000, and the wife, after the death of the testator, accepted the legacy, which was paid to her out of the proceeds of the farm. It was held, that this legacy was not, either by the express words of the will, or by implication, given in lieu of, or in bar of dower; but was a mere pecuniary bequest. The acceptance of it by the widow did not affect her right; and the purchaser of the farm took it subject to the claim of dower. *Adsit v. Adsit*, 2 Johns. Ch. Rep. 448. Where a legacy to a wife is not declared by any express words in the will, to be in lieu of dower, it will not be held to be in lieu of dower, unless such an intention in the testator is collected by clear and manifest implication from the provisions in the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. Chancellor Kent goes into an historical review of the cases on this subject, and considers the above principles as the result to be derived from them. *Ib.* 451. *S. P. Smith v. Kniskern et al.*, 4 Johns. Ch. Rep. 9. Where the widow and executrix was empowered to sell real estate, and she released land charged with a mortgage to satisfy the mortgage debt; held, that the widow was not entitled to be allowed her dower, as the heir derived no benefit from the sale. *Evertsen v. Tappan*, 5 Johns. Ch. Rep. 511. Where an executrix permitted land, whereof the testator died seized, subject to a mortgage, to be sold under the mortgage, and became herself the purchaser; it was held, that she was liable to account to the heirs for the proceeds, but as widow she was entitled to her dower, subject to a rateable contribution toward the extinguishment of the mortgage debt. *Ib.* 515. As to the mode in which this contribution was directed to be made, see ante, *Swaine v. Perine*, 5 Johns. Ch. Rep. 493. Where a widow and executrix was empowered to sell the real estate of the testator, &c., and on such sale to release her dower, and retain the value thereof out of the proceeds of such sale; it was held, that the value of the dower was to be computed according to the value of the property at the death of the husband, and not according to its in-

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stands in that situation to be favored, we refer to 1 Cruise, 135, sec. 22. He there remarks: "Lord Bacon, in his reading in the statute of uses, says, 'The tenant in dower

creased value afterward, by reason of beneficial improvements made thereon. Ib. 512. The action of dower does not come within the statute of limitations of the state of New York, (sess. 24, ch. 183, 1 N. R. L. 184,) as by the statute relative to dower, (sess. 10, ch. 168, 1 N. R. L. 60,) the widow may, at any time during her life, demand her dower, and the tenant of the freehold has the power of coercing an assignment of dower. *Jones v. Powell et al.*, 6 Johns. Ch. Rep. 194. Where a widow, who was entitled to dower in land, whereof her husband died seized, accepted an equivalent in other land, she was held to be equitably barred from setting up her claim for dower; especially, when she had accepted the equivalent and enjoyed it during the lapse of twenty years, and permitted the land, of which she was dowable, to be sold, and improvements to be made by the purchaser, without asserting her claim for dower. Ib. 194, 198. Where the husband aliens land, the dower of the widow is to be taken according to the value of the land at the time of alienation, and not according to the improved value of the land. *Hale v. James*, 6 Johns. Ch. Rep. 258. Where the husband dies seized, the widow takes her dower according to the value, at the time of its assignment to her by the heir. Ib. 260. Whether the widow is entitled to the advantage of any increase in the value of the land by extrinsic causes, as the discovery of a mine of coal or ore, &c., &c.: quære? Ib. 261. Where the husband mortgages land, and afterward releases the equity of redemption, the time of the release is to be taken as the period of alienation, from which the value of the dower is to be computed. Ib. 262. Where an agreement was made between the widow and the tenant, by which the widow consented to receive an annuity, instead of the dower being assigned to her legally, the interest of one third of the value of the land at the time of alienation is the proper measure of the annuity; but where there were houses, which constituted the principal value of the premises, one per cent. was considered as a reasonable and sufficient deduction from the annuity, on account of necessary repairs and risk against loss by fire. Ib. 263. As to the assignment of dower in parcels of her husband's estate, or when equity will decree it to one estate. *Wood v. Keys*, 6 Paige, 478. If lands descend to a son charged with the dower of his mother, and he dies in her lifetime, his widow can be endowed only of two thirds of the premises. *Reynolds v. Reynolds*, 5 Paige, 161. A widow may now, since the revised statutes, be endowed of lands of which the husband had an equitable estate. *Hawley v. Jones*, 5 Paige, 318. The wife is, by the common law, entitled to dower only where the husband had the legal title. But, by statute in Kentucky, she has dower in lands of which her husband had such an inheritance in the use or trust, as, had it been the legal estate, would have

is so much favored, as that it is the common by-word in the law, that the law favoreth three things: life, liberty, and dower.'” When, therefore, it must be remembered that the contract in fact was framed by the *husband alone; that it was his act; that he made his will only a few days before his death, perhaps on his sick bed; that he then knew and saw the situation of his wife, far gone in pregnancy, that he was actuated by the moral feelings described in Cruise; that he was a good and pious man, as appears by the donation to the orphans, only to be defeated by the person who also wishes the widow's dower; can it for one moment be disbelieved that the husband intended to put it in his wife's power to take her dower, or the \$1200 per annum, under the contract, which might in a small degree better her condition? If the will only

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entitled her to dower. *Herron v. Williamson*, Litt. Sel. Cas. 250. A verbal promise to convey to the husband will not entitle the wife to dower. *Ib.* But whether a bond or written contract to convey will confer such right: *quære?* *Ib.* A widow's right to dower before the assignment, is a mere chose in action, and cannot be sold on execution. *Tompkins v. Fonda*, 4 Paige, 448. And before assignment it cannot be conveyed. *Ib.* But may be reached in equity by a creditor's bill. *Ib.* As to the right of the widow to elect in relation to her dower. See *Wood v. Wood*, 5 Paige, 596. *Hawley v. James*, 5 Paige, 318. As the right of dower is a clear legal right, it cannot be regarded in equity as fraudulent to claim it at law, unless there has been some forfeiture, release, bar, or satisfaction which cannot be proved at law, but which may be established in equity. *O'Brien v. Elliot*, 15 Maine Rep. 125. To be a satisfaction of dower in equity, the equivalent must be designed, and accepted in lieu of, or as an equivalent for dower. *Ib.* Wild and uncultivated lands are subject to dower, and always have been in Ohio. *Allen v. McCay*, 8 Ohio Rep. 464. In assignment of dower, the value at the time of the assignment must be taken as the rule; but all increased value from actual improvements on the land must be excluded. *Ib.* In a partition suit, where the present value of a contingent or inchoate right of dower of a married woman, is ascertained under the decree, pursuant to the act of the state of New York, of April 28, 1840, such value represents the present worth of the woman's dower right in the premises, and the sum paid or reserved in respect of the same is her absolute property, without condition or contingency. *Bartlett v. Janeway*, 4 Sand. Ch. Rep. 396. See *Waterman's Am. Ch. Dig. tit. Dowry*.

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recognizes her dower, that is a waiver. Recognizing a debt barred by the statute of limitations, is a waiver of the statute. If the will amounts to no more than a waiver on the part of the husband, that puts an end to the question. The will opened the question and revived to the widow her right to dower, even if the contract would have barred her. The testator made in his will no provision for the payment of the annuity out of his real or personal estate. This he has given all away by his will. He takes no notice therein of the annuity; he therefore evidently intended that the widow should take either her dower or the \$6000, and that either would extinguish the annuity.

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2. But the acts of the complainant, stating to the widow, immediately after the death of her husband, that she had a right to dower, advising her by all means to take that in preference to any other provision; directing her to destroy the contract, which she accordingly destroyed; declaring that the counterpart was or should be destroyed; paying to her the third of the rent which became due a few days after the death of her husband; joining in a statement of facts to the then chancellor, presented to him on the 29th of March, 1819, stating expressly that the widow was entitled to, and had elected to take dower; continuing to pay her one third of the rents for her dower; deducting a commission therefor; joining in a second petition to the chancellor, of the 12th of June, 1820, again admitting her dower; executing a decree of the then chancellor, decreeing her dower, without asking for its repeal or revocation; continuing to pay one third of the rents as dower; in February, 1822, making an agreement with the widow respecting the rents, &c., acting under it; which acts are deemed evidence that the contract made by the widow, when an infant, was waived by the complainant, and establish the fact that he had assigned to her her dower in her husband's estate. But it is said he could not waive. It may be asked why? Does he pretend that

he is a trustee for any other than himself? He certainly does not. Why then is he not bound by his own acts?

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3. There is nothing in this case to show that M'Cartee was ignorant of the facts; the whole case shows that he was well acquainted with them. The will itself speaks of the marriage articles. He does not even pretend ignorance of the facts; he only pretends that John Anthon gave him bad advice, and that after the death of the child, he received better advice from Spencer, &c. I must here remark he produces no evidence of this new advice. Ingenuity cannot give this feature of defence any shape other than a mistake in point of law, if there be any mistake at all; and if so, then the law, as well as equity decisions bearing on this point, is well settled in the cases referred to in *Eden on Inj.* 8, 9, and by Chancellor Kent, in *Storrs v. Barker*, (6 John. Ch. R. 169.)

4. That the acts proved in the case, and some of which have been referred to, amount to an assignment of dower. An assignment may be made by parol; it requires no writing whatever; and it may be out of rents. (1 Roper, Hus. & Wife, 401, 2, 3. 1 Cruise, 161, sec. 1, 163, and the cases there referred to. Moore's R. 59. Dyer, 91.) It requires no particular form or ceremony; it is admitting the widow's right, and letting her into the receipts of the third of the rents; and if she be willing to receive the same, that is, I apprehend, an assignment by parol. Such an assignment was made in this case. The widow consented to it; appointed M'Cartee her agent or receiver, for reward; and the parties acted under that arrangement, from the death of the husband, for several years. M'Cartee was competent to assign dower; for in whatever character he pretends to hold this estate, being in the possession of it, claiming *the right to hold it as he does, (against all the world,) whether he was tenant of the freehold, disseisor, abator, or intruder, (1 Roper, Hus. & Wife, 387,) he had a right, and the widow had a right to call upon him, to assign dower; and when once assigned,

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1881. he who makes the assignment cannot avoid it, (except it
 M'Cartee be the heir, and then only for non-age;) (1 Cruise, sec. 7,
 v. 8, and the cases there referred to;) and he can annex no
 Teller. condition. If a condition is annexed, it is void, and the
 assignment remains. (1 Roper, Hus. & Wife, 402, 404.)
 If an adult heir over-assign, he has no remedy. (Id. 404,
 410.) The widow takes under a voluntary assignment as
 purchaser. (Id. 401. Co. Litt. 173, a.)

But the counsel for the complainant says: "Assuming that dower may be assigned by parol, it is founded on an undisputed right to dower." The answer to this is that neither the defendant nor any other person disputed the widow's right to dower. He knew then what he knows now; and he, with a full knowledge of all the facts, let her in to her dower, advised it himself, and it is now too late for him to dispute it; he is out of time, and cannot now dispute it, nor avoid the assignment, (1 John. Ch. R. 512, and 2 id. 51,) unless he alleges and proves a fraud practised by the widow. The counsel also contend that "the assignment of dower can only be made by setting off to the widow a distinct proportion," and refer to 1 Roper, Hus. & Wife, 389. This is true, when the assignment is made by process of law of common right. We refer to the same book, (page 395 to 400,) showing that by consent she may have her dower in common, and also of rents out of the estate to which she claims dower; and the authorities there, and those referred to, show that when made out of the rents, it is of as binding force as if made by process of law. The cases of Watkins, 9 John. R. 245, of *Jackson v. Randall*, 5 Cowen, 163, and of *Jackson v. Waltermire*, 5 id. 302, do not apply at all. The proceedings had in the case of Watkins, and upon which the parties relied as evidence of title, were nothing more than the incipient steps to assigning dower, and the court there said the steps taken only proved boundaries in case of title. Now if we relied upon proof only that M'Cartee stated to us "the proportion of the rents we would be

entitled to, provided we were entitled *to dower," then the cases referred to would apply. If the widow should be driven by the defendant to the necessity of taking the \$6000, in such case, we apprehend that she is not to account for the moneys voluntarily paid to her by the complainant, with a full knowledge of the facts, and received by her under his advice. (Eden on Inj. 8, 9, and the cases referred to.)

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As to an election at this time between the \$6000 and the contract, it is out of the question. Such election is put out of the question by the advice and course pursued by the complainant; for, by the re-marriage of Mrs. Teller, the \$1200 to be paid her during life, ceased; and it would not be unreasonable to suppose that she would not have changed her situation, and thereby relinquished a comfortable support during life, if it had not been that the complainant assured her that she was entitled to dower, and assigned it accordingly. *Wake v. Wake*, (1 Ves. 335,) does not apply. The widow does not here, as there, claim both; she only asks the dower; she does not ask to break up what has been acted upon; the complainant asks that. The voluntary payments by him fall within the authorities in Eden, and the principles in the case of *Storrs v. Barker*, (6 John. Ch. R. 169.) Chancellor Kent says: "Defendant avers that he mistook the law of the land, and did not know that the devise of a feme covert was void, or that his title was good, till late in the year 1816. I am induced, from the proofs in the case, to believe the truth of the averment; and the question then arises, whether ignorance of his title will prevent the application of the doctrine. The presumption is, that every man is acquainted with his rights, provided he has a reasonable opportunity to know them; and nothing can be more liable to abuse, than to permit a person to reclaim, in opposition to all equitable circumstances, upon the mere pretence that he was at the time ignorant of his title. Such an assertion is easily made, and difficult to

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[*553] contradict. It is rarely that a mistake in point of law, with a full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practised upon mankind. If he be allowed to plead his voluntary ignorance in *destruction of equitable rights growing out of his own acts and assertions, the grossest impositions, and the greatest frauds might be practised with impunity. It would seem to be a wise principle of policy that ignorance of the law, with knowledge of the fact, cannot be set up."

The statute concerning jointures, as well as the project creating equitable jointures, contradicts the common law; they are therefore to be construed strictly; (1 Cruise, 198, sec. 6;) and Lord Coke lays it down, that no estate limited to a woman shall be deemed a good jointure, and a bar to dower, unless it has certain requisites. (1 Inst. 36 b, 36 a. 1 Cruise, 198, sec. 5, 6. 1 Roper, Hus. & Wife, 473, 459, 460. *Caruthers v. Caruthers*, 4 Bro. C. C. 500.) It is defined to be "a competent livelihood of freehold for the wife, of lands or tenements, to take effect presently, in possession or profit, after the decease of the husband, for the life of the wife at the least." It must take effect, in possession or profit, immediately from the death of the husband; it must not depend upon any contingency, to happen or not to happen, during the life of the husband. It must be absolute, and so that the jointure attaches, or becomes vested in the wife, at the death of the husband. (*Earl of Buckinghamshire v. Drury*, 2 Eden, 64, 74. 1 Cruise, 198, sec. 7, 8, 9.) In 1 Roper, Hus. & Wife, 459, it is stated that the mere possibility of the jointure of the wife not taking effect upon her husband's death, renders it invalid; it must be so limited as to insure that circumstance. There is no case to be found, at law or in equity, to show that a provision in lieu of dower, liable to be forfeited during coverture, is a bar to dower, nor can there be any such decision. The wife, during coverture,

under the control of her husband; and if such should be the law, it would, in ninety-nine cases out of one hundred, be in the power of the husband to render that which the law always intended to be the most certain, the most precarious. The jointure must also be reasonable. (4 Kent's Com. 53 to 58.)

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In this case the provision is made to depend upon a condition, "that she does not, during his life, contract any debt to the amount of \$20, without his consent, for which he may be made accountable." It may be said that for necessities his consent would be implied. To that may be replied, for no other debt but for necessities could he be made accountable. It therefore follows that her provision is made to depend upon her not contracting any debt, not even for necessities, unless she should, in case of a contest, be able to prove that she so contracted with his express consent. But suppose this depended upon her contracting a debt for an unnecessary article, for which he might be made accountable to the amount of \$20, during the life of husband and wife; would not that render this proviso too uncertain? In the restless case of *Drury v. Drury*, (2 Eden, 64,) the Earl of Hardwicke says: "Every certain provision, though not a jointure within the act, is good in equity. Again, it is to be freehold." In *Drury v. Drury*, the house of lords yielded to the words in that settlement, "should be settled and assured in the manner thereafter mentioned, and also that the defendant, in case she should survive the said Sir Thomas Drury, should have or enjoy an annuity or yearly sum of six hundred pounds, clear of all taxes and deductions whatsoever, during her life, for and in the name of her jointure," &c. (2 Eden, 38, 39,) as settling the jointure upon a freehold; and they put the case to the judges as one under the statute of jointures, and not as a case upon contract. The contract in this case has no such words to hang upon. It is a naked covenant, binding no land; nor could it at any time have been placed

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1831. as a charge upon a freehold, as the Earl of Hardwicke
 J'Cartee says might have been the case in *Drury v. Drury*. (1
 V. Roper, Hus. & Wife, 486, 503; *Girling v. Lee*, 1 Vern.
 Toller. 63; *Freemount v. Dedire*, 1 P. Wms. 429; 3 id. 212; 3
 Atk. 327; *Carpenter v. Carpenter*, 1 Vern. 440.) But
 suppose words sufficient had been found in this con-
 tract, would not the suspense in which the provision
 was placed, that is, the non-contracting of any debt,
 &c., have operated as an objection against the court
 of equity's decreeing it to be a lien on any specific
 property, upon the ground of the uncertainty of the pro-
 vision's ever taking effect? If it is, as Eden says, (3
 Eden, 74,) doubted whether the decision in *The Earl of*
 [**555*] *Buckinghamshire v. Drury* be proper, it may be more so
 here, as that case was undoubtedly settled upon *princi-
 ples of national policy, and not upon principles of law,
 or of the rights of persons; and but few, if any, of the
 considerations urged by the leading members of the
 house of lords, can be urged here, not even if we were
 about establishing a rule for the government of good
 society, who ape the nobility, and claim an alliance with
 the great families in Great Britain; for I believe it can-
 not be pretended that they have any jointure houses in
 this state; nor can it be pretended that any of the dread-
 ful consequences would follow here, by rejecting the con-
 tract, that Hardwicke supposed would in *Drury v. Drury*.
 No chancellor here will be liable to be impeached for di-
 recting his master to settle the terms of the marriage of
 his ward, &c.

The propriety of the decision may well be doubted,
 then, after it has become a well settled principle that an
 infant cannot settle his freehold in jointure, nor a female
 bind her real estate by contract of marriage. Yet, upon
 the authority of *Drury v. Drury*, the anomaly, to use
 the word of Spencer, that a female infant can release a
 right in another estate to be acquired, when she cannot in
 that already acquired, is contended for. The jurisdiction

the court of equity in enforcing contracts of marriage
ments, as well as all other contracts, existed before
statute of jointures. (1 Roper, 479.) Previous to
passing of the act, various contrivances were invented
ways of that day to prevent the wife from taking
her. (1 Cruise, 195. 1 Roper, Hus. & Wife, 456.)
was pressed upon the legislature to pass the act to pre-
vent what was considered an increasing evil. Now it is
a remarkable fact, if infants could bind themselves by a
contract for a provision in lieu of dower to be enforced
in equity, that there should have been such a pressing
necessity for the statute, and that no case is to be found
before the passing of the act, nor until the restless case
of *Curry*, to show that equity would enforce such con-
tracts of infants; and we presume it cannot be contended
that the statutes enlarged the jurisdiction of the courts of
equity, or enabled them to enforce contracts not binding
in equity before the passing of the act.

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THE CHANCELLOR. Before I proceed to examine the
question whether the ante-nuptial contract was ever an
absolute bar to the wife's right of dower in this case, I
notice the last point made by the counsel for the de-
fendants. It is supposed by them that by the will of the
testator he intended to waive his right to insist on the
ante-nuptial contract; and to give the widow the right to
have her dower in his real estate, or to receive the pro-
vision made for her by the will, or that made previous to
marriage, at her election. On a careful examination
of the provisions of this will, I am satisfied that such
could have been the intention of the testator. It is
the provision in the will is in lieu of dower, as well
as the marriage articles; and if the widow accepted
the will was required to release her dower, as well as to
release the marriage contract. The counsel who prepared
the will undoubtedly advised the testator that the ante-
nuptial contract was not, at law a bar of the right of

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Teller. dower. It is very probable that he also informed him there was even doubt as to its being an equitable bar. It was therefore almost a matter of course to insert a clause in the will declaring this new provision to be in lieu of dower as well as of the marriage contract; and to direct a release of the dower as well as the cancelling of the contract. In the clause relative to the election, however, the testator is careful not to authorize the widow to elect between her dower and the testamentary provision; but only between the provision made in the will, in lieu of dower, and that contained in the ante-nuptial contract, which was also in bar of dower.[1]

[1] If the bequests to the widow are intended to be in lieu of dower, she shall elect, and not take both as doweress and under the will. In England, the intention must appear on the face of the will. In Virginia, testimony dehors has been received. *Baily v. Duncan's Reps.*, 4 Monroe, 265, 266. Bequest of a slave to the widow, and disposition by the will of all the balance of the estate to others, shall not be construed as intended to be in lieu of her dower in lands. *Ib.* The act requires the widow to elect between the provisions of the will and of the law, only as to chattels and slaves; and so she do not claim under and against the will, she may have both her devise and her dower. *Wood v. Lee*, 5 ib. 58. A widow claiming dower, and having it partitioned off to her by legal process, and holding and enjoying the same for several years, has made her election, and cannot afterward set it aside and claim the third in fee simple, under the statute, when the estate is nearly settled. *Quarles v. Garret*, 4 Desau. 146. A widow cannot be compelled to elect before the estate is settled; and if the will allows her an annuity until the estate is settled, it is no objection to the payment of the annuity, that she has not elected. *Hall v. Hall*, 2 McCord's Ch. Rep. 280. In some cases the widow has been allowed to retract from an election prematurely made, the condition of the estate not being known. *Ib.* There are two classes of cases of election: 1. Where there are inconsistent dispositions; and 2. Where a condition is annexed to the gift. *Ib.* 306. If a devise of land, in Virginia, to the widow, appear from circumstances to be intended in lieu of dower, she must make her election, and cannot take both. *Herbert v. Wren*, 7 Cranch, 370. If the widow does not renounce her husband's will within one year after his death, she loses her distributive share of the personal estate, and is confined to the provisions of the will; but is entitled to her dower in the lands. *Blunt v. Gee*, 5 Call, 481. A husband conveyed real estate in fee, without his wife's joining. Afterward, by will he bequeathed to the wife a third of the remainder of his real and personal

the question whether an infant was barred by a jointure before marriage, was for a long time unsettled in England. Lord Coke says: "If the jointure be made before marriage, the wife cannot waive it and claim her share at the common law." (1 Inst. 36, b.) And in a note in the hand writing of Lord Hale, in the margin of Coke's Institutes, he remarks: "Though she be within age, as we see, she cannot waive." This note, made more than 100 years previous to the final decision of the question in the house of lords, is the first dictum which I have been able to find on this subject. The first judicial determination appears to be in the case of *Jordan v. Savile*, before Lord King, in 1733. (2 Eq. Ca. Abr. 102.) It was not a legal jointure under the statute, neither was the ante-nuptial provision set up in bar of legal dower. The estates of the husband were copyhold; in which, by the custom of the manor, the wife was entitled to the whole for life, as her free bench. The land, by an ante-nuptial contract, was settled in such a manner as to give her only the moiety, on the death of the husband, in lieu of a jointure, and in lieu of her customary dower. The wife being an infant, the question was whether she had a right to waive the provision made by contract, and claim her customary estate in the dower. And the court of chancery considered the ante-nuptial settlement an equitable bar of the customary dower of the infant, by analogy to the statute respect-

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ing, "as and for her right of dower during her life." She accepted it, that it was a relinquishment of her claim for dower out of the realty which had been conveyed by the husband alone, as well as of the lands of the husband which were seized at the time of making his will. *Steele v. Edwards*, 1 Edwards, 435. Where a legacy to a wife is not declared by express terms to be in lieu of dower, it will not be so intended unless such intention can be deduced by clear and manifest implication from the provisions of the will; so that the claim of dower would be inconsistent with the will, and repugnant to its dispositions. It must, in fact, if admitted, contradict and defeat the will. 1b. 451. See *Waterman's Am. Ch. Dig.* tit. 11.

1881. *McCartee v. Teller.* ing jointures, and that the infant was bound to accept the provisions as an equitable jointure. In the case of *Sice v. Seys*, in 1740, (Barnard. Ch. R. 117,) the lord chancellor asserted the same principle, though the question was not directly before him there. And it was again recognized in 1748, in the case of *Harvey v. Ashley*, (Wiln. R. 219, n.) In a case before the master of the rolls, in 1734, (*Carey v. Willis*, 9 Vin. Abr. 249,) Sir Joseph Jekyll is said to have held a different language. By a note of that case from the register's book, however, it will be found that the wife claimed the right of election, on the ground that it was not agreed that the ante-nuptial provision should be in lieu of dower. (See 1 Roper, Hus. & Wife, 466.) The question as to an infant's being bound by a jointure, I presume could not have been discussed in that case; and it is very improbable that a master of the rolls would undertake to overrule the decision which the lord chancellor had made but a few months before in the case of *Jordan v. Savage*.

[*558] In 1760, the case of *Drury v. Drury* came before Lord Henley, afterwards Earl of Northington, and was twice argued at great length, occupying in the whole seven days. It resulted in a decision by him, that an infant was not barred of her dower, either by a legal or an equitable jointure. The cause came before the house of lords on appeal, 1762, and this *disputed question was finally put at rest in that country. Although three very respectable common law judges concurred in opinion with Lord Henley, that an infant was not bound by a jointure in any case, yet the weight of authority, as well as the weight of judicial talent, was clearly in favor of the decision of the house of lords, on the appeal. This case, as reported by Brown, (5 Bro. P. C. 570, *Earl of Buckingham v. Drury*,) merely contains the statement of the case, the arguments of counsel, and the reversal of the decree. But in the notes of the judgments and opinions of Ch. J. Wilmot, published forty years after

wards, his very able and elaborate opinion on this question is now found. (Wilmot's Opinions, 177.) He examined this question at great length, and with much ability, and seems to have exhausted thereon the whole store of ancient learning, in relation to the rights and liabilities of infants. He concurred in opinion with the majority of the common law judges, that the infant was barred. And by a reference to the report of this case by a grandson of Lord Northington, (2 Eden's R. 60,) more recently published, it appears that the venerable Earl of Hardwicke, who held the great seal with such extraordinary reputation for about twenty years, but relinquished it on the formation of Pitt's first ministry, in 1756, concurred with a majority of the judges, and delivered a most able opinion on the question in the house of lords. It also appears that the able and distinguished Lord Mansfield, then a member of the house of peers, also took a part in the decision, and voted in favor of a reversal of the decree.

In that case the ante-nuptial contract was entered into by the lady while under age, and was executed by her in the presence of her guardian, who subscribed the same as a witness. The husband agreed that in case his intended wife should survive him, his heirs, executors or administrators should pay her, during her life, an annuity of £600, for and in the name of her jointure; which provisions she agreed to accept, in full satisfaction of her dower, and of her allowance, under the statute of distributions. It was therefore finally settled by that case, that an infant is bound at law by a legal jointure; and that in equity, in analogy to the legal *rule, the infant may also be barred by an equitable jointure, settled upon her before marriage, by the consent and approbation of her parents or guardian. Although some members of the profession entertained doubts of the correctness of this decision, yet as it was made by the court of the last resort, and with the entire approbation and concurrence

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of the most distinguished judges in England, it became the settled law of the land as to all cases coming within the same principles. And being made previous to our separation from the mother country, it must be considered equally binding on us here. An equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the father or the guardian of the infant before marriage, and to which there is no other objection but its mere equitable quality, is therefore an equitable bar. (*Corbit v. Corbit*, 1 Sim. & Stn. R. 612.)

Perhaps a strictly legal jointure, under the statute which was in force at the time this ante-nuptial contract was made, was a bar, a *provisio viri*; and that the actual consent of the wife or her guardian need not be proved to establish the validity of such a jointure. But even in such a case, I apprehend it would be a fraud upon the wife, and would not bind her in equity, if the fact, that a provision in lieu of dower had been made, was intentionally concealed from her and her friends or legal protectors until after the marriage. By the revised statutes, to constitute a valid bar of dower, the provision by way of jointure must be expressly assented to in writing, by the lady if an adult, and both by her and her father or guardian if she is an infant. (1 R. S. 741.) The distinction between legal and equitable bars is now abolished; and hereafter the infant will be bound in the same cases and to the same extent as an adult.

In the case of infants, under the former law, this court, as to equitable bars, proceeded only in analogy to the statutory provision. But an adult female might in equity bind herself by an ante-nuptial agreement, to receive a simple pecuniary provision, although uncertain as to the time of its commencement, or as to the extent of its duration. (Per Lord Alvanley, 4 Bro. C. C. 513. *Clancy*, 221, 2 1 Mad. R. 613.) To make *a mere equitable jointure binding on the infant, it was necessary that the provision should be as beneficial to the infant, and *

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certain, as that required in a legal jointure to constitute a legal bar. In other words, it must be a provision to take effect in possession or profit immediately on the death of the husband and to continue during the life of the widow; it must be made with the express or implied assent of the parent or guardian, and in satisfaction or in lieu of dower; and it must be a reasonable and competent livelihood for the wife, in reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the wife's portion received with her on the marriage. (1 Inst. 36, b. 4 Kent's Com. 53. Wilmot's Opinions, 209.)

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In this case the wife brought no portion to the husband; and he left a large real estate. By the ante-nuptial contract he gave to her, in addition to the furniture and plate, an annuity of \$1200, to commence immediately on his death; and he made it an equitable charge upon the real and personal estate of which he should die seized and possessed. The answer to the suggestion that the whole estate might be disposed of, or dissipated, before his death, appears to have been given by Lord Hardwicke, in the case in the house of lords, (2 Eden's R. 67;) that "the *spending* of the property on which the equitable jointure was charged would be an eviction in equity, and consequently would have remitted her to her dower, in analogy to the eviction of the jointure at law."

The only objections therefore to this ante-nuptial provision, as a valid bar of dower, in equity, are the conditions annexed to the commencement and continuation of the annuity. And as the infant is only bound by an equitable jointure, in analogy to the statute, if these conditions would not have been binding on her as a legal jointure, had they been contained in a conveyance of a freehold estate before marriage, they cannot now constitute an equitable bar.

It seemed to be taken for granted by the counsel for his complainant on the argument, that the conveyance of

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an estate before marriage, to an adult female, during her widowhood, by way of jointure, would bar her right of dower; and could not be waived by her after the death of the *husband. But I do not think the counsel on either side examined that question with their usual industry and discrimination. The only case I have been able to find, in which the question has arisen on such a limitation, is the one reported by Sir Francis Moore, in the third year of the reign of Queen Elizabeth. (Moore's R. 31, pl. 103.) By that case it appears that the husband, by his will, devised all his lands to his wife, during her widowhood, in lieu of dower; and after his death she entered under the devise, and again married. Chief Justice Dyer thought the right of dower was only suspended during the continuance of the particular estate. But Weston and Benloe, justices, held that the estate was a freehold, and only determinable by her own act; and as she had accepted of the particular estate in the whole premises, as a jointure, she could not afterwards claim dower in the remainder also. In Vernon's case, which came before the same court a few years afterwards, (3 Dyer's R. 317, a; Benloe & Dal. R. 210; 4 Coke's R. 1; 3 Leon. R. 28, S.C.,) an estate, by way of jointure, was granted by the husband, after marriage, to the wife for life, on condition that she performed the will of her husband. After his death she agreed to this jointure, and took possession of the land so granted to her; and it was held, by a majority of the court, to be a good legal jointure, within the statute. It will be seen that in neither of these cases was the jointure binding on the wife, if she had not assented thereto after her title to dower had accrued; it being made during coverture. Both cases, therefore, came within the ninth section of the statute concerning uses and wills. (27 Hen. 8, ch. 10. 1 Evans' Statutes, 414.) By examining that section it appears that the widow is bound by the acceptance of a freehold, given to her during coverture, "for the term of her life, or otherwise, in

jointure." The voluntary acceptance of a conditional or determinable fee, after the death of the husband, is therefore within the words of that section of the statute. And in both of these cases the court placed their decisions upon the voluntary acceptance of the jointure, by the widow. In the case of the *Earl of Buckinghamshire v. Drury*, Chief Justice Wilmut says: "The different *form of pleading a jointure made before and after marriage, is extremely material, to prove that it is the act of the husband which makes the bar in the one case, and the subsequent agreement of the wife which makes the bar in the other." (Wilmut's Op. 215.) Bacon also says: "If an estate be limited to the wife on condition, her acceptance of such a conditional jointure makes it good." (3 Bac. Abr. 714, Jointure, B. 2.) This distinction does not seem to have been noticed by Roper, who says, generally, that "if the jointure be limited to the wife after the death of her husband, *durante viduitate*, or upon condition that she perform her husband's will, &c., such limitations, made in lieu of dower, will be good legal jointures." (1 Roper's Hus. & W. 462.) But Vernon's case, as reported in Coke, is the only authority he refers to, to support this position. Clancy, on the other hand, recognizes the distinction. He lays down the rule that an estate for the life of the widow, on condition, is a good jointure, within the intent of the act, if the widow enters and accepts the conditional freehold. He then adds: "But it would seem that a jointure of this description, although it were before marriage, would not be binding on the widow, unless, after the husband's death, she enters and accepts the conditional estate." And he also refers to Vernon's case, as reported by Lord Coke, to sustain that opinion. (Clancy, 209.)

This distinction, I think, may be supported on principle. Lord Coke says: "Reasonable and legitimate dower belongs to every woman, of a third part of all the lands and tenements of which the husband was seized in his

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1881. demesne as of fee." (Co. Lit. 36 b.) *Doti lex favit* is a legal maxim. And Lord Bacon, in his reading on the statute of uses, says it is the common by-word of the law, that the law favoeth three things: life, liberty, and dower. It was not, therefore, the intention of the statute respecting jointures, to deprive the widow of her common law right, without a fair equivalent. Hence, if she is to be barred *a provisione viri* merely, she must have an estate equal in its commencement and duration with that which the common law has provided; and unclogged with conditions and restrictions which may destroy the right. But with her own assent, a less certain provision of freehold may be *substituted. At the time of making this statute, a freehold estate alone was considered a fair equivalent for a freehold; and therefore, at law, the acceptance of such an estate only was held to be a bar of dower, which was a freehold.(a) If such an estate was settled on the wife, although it was a base or determinable fee and might not continue for her life, if she entered on the estate and elected to receive it in lieu of dower, after the death of her husband, she was concluded by such election, in analogy to the principle by which she was concluded at the common law, by the acceptance of dower *ad ostium ecclesie*, or *ex assensu patris*, after the death of the husband. A court of equity therefore, by analogy, will bar the right in the one case by an adequate provision of equal duration with her dower, settled on her before marriage; and in the other, by her voluntary agreement, before the marriage, or after its termination, to accept any fair equivalent, without regard to the continuance of the provision. But in the latter case, as an infant was incapable of consenting, before the recent statute, she was not bound in equity by an ante-nuptial provision, clogged with conditions limiting its duration; and she might make her election after the disability was removed

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(a) See Jickling's *Analogy between Legal and Equitable Estates*, p. 154.

The condition that the wife should live chaste, inserted in these marriage articles, could not be objectionable; because a breach of that condition would equally have forfeited her dower. As to the condition that she should not run her husband in debt, I have more doubts.

The other objection, that the annuity was limited to the widowhood of the infant, and has not been accepted by her since the removal of her disability to contract or assent, I must consider fatal to the complainant's claim of an equitable bar. In ordinary marriages, such a limitation might not be considered as unreasonable. The chances of the wife's outliving the husband are about equal; and if she survives, she will probably have arrived at an age when it may not be considered a very great hardship if she is compelled to live single, to preserve her jointure. But when an old man of *seventy-five marries a lady too young even to make a valid contract to bar her dower; when the frost of January weds the bloom of May, such a condition as this is inequitable and unjust. After she has sacrificed her youth to him, to share his frozen couch for a few years at farthest, it is unreasonable to impose upon her the obligation of living single for the rest of her life, as the condition upon which alone she is permitted to retain an equitable equivalent for her dower in his large estate. Such a provision, and under such circumstances, ought not to be enforced, as an equitable jointure, against an infant who has done no act to sanction it since the death of the husband.

Another objection to granting equitable relief in this case is, that the complainant has substantially assigned to the widow the third part of the rents and profits of the estate, as her legal dower. As both parties acted on the supposition that the ante-nuptial contract was not binding on the widow, if they were under a mistake, it might perhaps be remedied at this time, provided both parties could be restored to the situation in which they were placed, in respect to this matter, when that assignment

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took place. But if the complainant has been deceived as to his equitable rights, he has also been the means of deceiving her, by not setting up this equitable claim in due season. If she had supposed that she was to lose both her annuity and her dower by marrying a second time, it is very probable she would have postponed the marriage until she could make some composition with the devisees in regard to this annuity. At her age, and with the power of continuing the annuity for life, if she pleased, she certainly could have obtained a very liberal allowance in consideration of the relinquishment of future payments. Where there is merely an equitable bar of dower, it is certainly optional with the heir or devisee, whether he will insist on it or otherwise. If he assigns dower under such circumstances, this court will not relieve him, except upon some new ground of equity—as mistake or accident; and in such case too, he should offer to do equity. Under the circumstances of this case, if any relief as against the widow's dower could be granted, it should be on the condition of paying to her the *annuity for life, or a fair equivalent therefor, notwithstanding her marriage since the assignment of dower.

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It is said however that the complainant is a mere trustee, and therefore that his acts are not binding on the *cestui que trust*. I do not intend to express any definite opinion on that point at this time; but under the decision of the court of errors in respect to this will, I doubt whether the executors are trustees for any one. There is no allegation in the bill that there are any heirs of the testator in existence capable of taking this estate by descent, or as *cestui que trusts* by implication. If there are any, they should be parties; so that the decree might bind them, if they are not already bound by the act of the executor in assigning dower. If the legal and equitable estate are united in the executors, on the ground that they took a conditional fee which has become absolute by the death of the child, this objection to the validity of the

assignment of dower is untenable. If, on the other hand, 1881.
 their estate terminated with the life of the child of the In the matter
 testator and the land escheated to the state for want of of Congdon.
 heirs, the complainant has no equitable rights to protect,
 and this bill cannot be sustained. A defendant in an
 ejectment suit who has no interest in the land, either in
 his own right or as the trustee or legitimate representative
 of another, cannot come here to set up an equitable
 defence to the suit. If neither of the parties to the suit
 have any equitable claim to the property in dispute, this
 court will leave them to their legal rights. (*Meigs v.*
Dimock, 6 Conn. R. 458.)

The order of the vice chancellor denying the applica-
 tion for an injunction was correct : and must be affirmed,
 with costs.

*IN THE MATTER OF G. AND E. CONGDON, INFANTS.

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The provision of the revised statutes, which authorizes the general guardian
 of an infant tenant in common, with the consent of the court of chancery,
 to agree to a sale of the estate, for the purpose of making partition, does
 not authorize the guardian to sell to a co-tenant, but only to join with
 the other tenants in common in a sale of the joint interest in the
 property.

The court will not authorize the guardian to join in a sale, except on the
 report of a master that such sale is necessary and proper ; and the guar-
 dian must give security for the faithful performance of his trust on such
 sale, and to bring the proceeds of the infant's share into court, or to
 invest and account for the same, as the court shall direct.

If a co-tenant wishes to buy the infant's share in an estate which cannot be
 divided, and is willing to give the fair value thereof, the general guard-
 ian should apply for liberty to sell, under the article of the revised stat-
 utes relative to the sale and disposition of infants' estates.

It is a sufficient ground to authorize a sale of an infant's property, that it
 is held in common with adults, and that the value of the estate is small,
 in comparison with the expense of a partition suit, to which it must
 otherwise be subjected.

C. F. INGALLS, in behalf of the general guardian of the August 4th

1831. infants, presented a petition under the 86th section of the
In the matter title of the revised statutes, relative to the partition of
of Congdon. lands, (2 R. S. 330,) praying that the guardian might be
 permitted to sell the share of the infants in the premises
 to the adult owners of the other shares. The premises
 consisted of a farm of about 180 acres.

[*567] THE CHANCELLOR. The object of the section, under
 which this application is made, was not to authorize the
 guardian of an infant tenant in common to sell to his co-
 tenants. It was to authorize him to join with them in a
 sale of the property, where it is so situated that it cannot
 be partitioned without great prejudice to the owners;
 and where a sale would be decreed on a bill filed for that
 purpose. Even in those cases the court will not authorize
 the general guardian to join in a sale, unless upon the
 report of a master that such a sale is necessary and
 proper. And the guardian must also give a bond, with
 two sufficient sureties, in double the value of the share of
 the infant in the property, and the interest thereon during
 minority, conditioned for the faithful *performance of the
 trust by such guardian on the sale, and to bring the pro-
 ceeds into court, or to invest and account for the same, as
 the court shall direct.

If it is for the interest of the infant to sell, and the co-
 tenant is willing to buy his share at its fair value, the
 proper, as well as the more simple mode of proceeding,
 is to apply to the court under the article of the revised
 statutes relative to the sale and disposition of infants' es-
 tates. (2 R. S. 193, § 170. Rule 157, &c.) The fact that
 the property of an infant is liable to the expense of a pro-
 ceeding in partition, by adult owners of an undivided
 share thereof, is always taken into consideration in decid-
 ing upon the propriety of authorizing a sale. And it is
 always a good reason for selling the infant's undivided
 share, under this article, that the estate is held in common
 with adults; and that the value of the estate is small,

when compared with the expense of a partition suit, to which it will be subjected, if a sale by a special guardian should be refused.

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Corning
v.
White.

In this case an application must be made for a sale under that provision of the statute; and the co-tenant, or any other person, can then become the purchaser, at a fair valuation.

CORNING & NORTON v. WHITE.

The judgment creditor who first files his bill in chancery obtains a priority in relation to the property and effects of the defendant which cannot be reached by execution at law.

An insolvent may assign his property for the benefit of all his creditors, rateably, without depriving himself of the privilege of applying for a discharge from imprisonment for debt, under the statute.

An assignment, after the lien of a creditor has attached by the filing of a bill, only conveys the property to the assignee subject to that lien.

THE bill in this cause was filed by judgment creditors August 4th. to reach the equitable assets of the defendant, after an execution at law issued against him had been returned unsatisfied. The defendant, in his answer, admitted the rights of the complainants, and that he possessed equitable assets; but alleged *that he had other judgment creditors whose executions were unsatisfied. And he insisted that they were entitled to a share of his property.

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Ira Harris, for complainants.

J. R. Lawrence, for the defendant.

THE CHANCELLOR. This court has frequently decided that the creditor who first files his bill here to reach the defendant's property, which cannot be sold on an execution at law, obtains a preference; and that the defendant

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has no right to object that there are other creditors whose debts he had also refused to pay out of such property. Equality among creditors is equity, whether their debts are in judgment, or otherwise; and every debtor has the right to act upon that principle, without impairing any of his rights. He cannot be discharged under the insolvent acts, if he gives a preference to one creditor over another, knowing himself to be insolvent. But if he is an honest man, and wishes to put all his creditors upon an equality, he may assign his property to his creditors, to be distributed among them rateably; or he may convey it to some responsible trustee, to be applied to the payment of all his debts, without giving preference to any. If he does this before any of the creditors have obtained a preference at law, or by filing a bill in this court, they will all be placed on a footing of equality. But the filing of the bill here, under the provisions of the revised statutes, operates as an attachment of property which cannot be levied on at law. It gives to the vigilant creditor a right to a priority in payment; and the creditor who next files his bill will have the second lien. An assignment under the insolvent act, after the commencement of the suit, only gives to the assignee a right to the surplus, after payment of the complainant's debt. The defendant, after the service of the injunction, can only make an assignment subject to the prior equity of the complainant. The receiver is an officer of the court who takes the property and holds it subject to the equitable claims of all parties; and after payment of the debt of the complainants, he will be directed to bring the *surplus into court, to be paid over to whoever may be entitled to the same.

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There must be a decree in this case, declaring the right of the complainants to all the property, choses in action, or other equitable effects of the defendant, which he had at the time of the commencement of this suit, or which were held in trust for him, except his necessary bedding

and other articles which are exempt from execution, or so much thereof as may be necessary to pay their judgment, in the pleadings in this cause mentioned, together with the costs of this suit; and a receiver must be appointed to receive the said property, choses in action, and effects, to convert them into money, and to apply the same in satisfaction of the judgment and costs.

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There must also be a reference to a master, residing in the county of Onondaga, to appoint a proper person as receiver, and to take from him sufficient surety for the execution of his trust. And the defendant must disclose, assign, and deliver over on oath to such receiver, under the direction of such master, all such property, choses in action, and effects, and the proceeds of such as have been received and collected by him since the commencement of this suit. The receiver is to have the usual power to compromise and collect the debts, and convert the property and effects into money, and to apply the same in satisfaction of the complainant's debt and costs. And either party is to be at liberty to apply to the court, on petition, for such further directions in the premises as may be necessary. If the defendant has been discharged under the insolvent act, since the commencement of this suit, and the assignee has taken possession of any of the property, in violation of the injunction, as he is chargeable with constructive notice of the pendency of this suit, it will be his duty to deliver the same over to the receiver, subject to his claim upon the surplus, if any there be, for the benefit of the general creditors.

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v.
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*THE PRESIDENT, DIRECTORS AND COMPANY OF THE CITY
BANK v. BANGS AND OTHERS.

Where one of the defendants in a bill of interpleader, by his answer, makes a claim against the complainant beyond the amount admitted to be due and paid into court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand which is not in controversy with the other defendants.

If the defendants, or either of them, deny the allegations in a bill of interpleader, or set up distinct facts in bar of the suit, the complainant must reply to the answer, and close the proofs in the usual manner, before he can bring his cause to a hearing.

But where the defendants admit the facts stated in the bill, and on which the right to file the bill of interpleader rests, and set up no new facts, as against the complainant, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the cause down for a decree to interplead, without waiting until the proofs are taken as between the defendants.

If the cause is ripe for a decision between the defendants, as well as between them and the complainant, the court settles the conflicting claims of the parties, and makes a final decree on the first hearing.

Where the suit is not in readiness for a decision as between the defendants, the court merely decides that the bill is properly filed, and dismisses the complainant with his costs up to that time; and directs an action to be brought, or an issue, or a reference, to ascertain and settle the rights of the defendants to the fund in controversy.

On a reference to a master to settle the rights of defendants in a bill of interpleader, as between themselves, the court will give them the benefit of a discovery, as against each other, if they, or either of them, desire it.

August 29th. THE City Bank having been robbed of a large sum of money, offered a reward of \$10,000 for the recovery of the same, and a proportionate sum for any part thereof. The notice in which the reward was offered stated the several kinds of money and bank notes stolen, and *about* the amount of each, in round numbers. The aggregate of the amounts thus stated was a little less than \$225,000, the real amount of the loss not having been then ascertained by the officers of the bank. It was afterwards discovered

that the actual loss was \$248,764; of which sum \$185,602 was recovered through the agency of the defendants, or some of them. There being several conflicting claims for the reward, and Bangs, one of the claimants, having sued the *complainants at law to recover the same, a bill of interpleader was filed by the bank. The sum of \$7460.97, being the proportion of the reward which the amount recovered bore to the whole amount stolen from the bank, was paid into court, and an injunction was granted without opposition, to restrain the suit at law. The several defendants answered the bill, claiming the amount of the reward which had been paid into court. The defendant Bangs also claimed the right to a farther sum; insisting that he was entitled to such proportionate part of the reward offered as the amount recovered bore to the amount of the loss as stated in the notice.

The cause was submitted by consent, without filing a replication to any of the answers; and upon a written agreement to admit the truth of all the allegations in the complainant's bill.

W. C. Wetmore, for the complainants.

R. Bogardus, for the defendant Bangs.

W. Muloch, for Maria Van Riper.

W. S. Sears, for J. & B. J. Hayes & Z. Homan.

THE CHANCELLOR. It seems from the answer of the defendant Bangs, that he claims from the complainants an amount beyond that which is claimed by the other defendants, and which exceeds the amount paid into court. As to that claim there can be no decree that the defendants interplead. And even if this court should put the construction on the bank notice, which is contended for by Bangs, there is not before me any evidence of his

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right, to enable me to make a decree in his favor against the complainants. I see no other remedy than to permit Bangs to proceed with his suit at law to recover that sum, if he thinks there is any probability of success. If he elects to proceed in that way, the question as to the right to costs, as between him and the complainants, must be reserved until the event of that suit is shown, or until the further order of the court. If within 20 days the defendant Bangs gives written notice of his election *to proceed at law to recover such excess, he must be permitted to go on with his suit there, on his stipulating to abandon, in that suit, all claim to the reward, to the extent of the sum paid into this court. If he does not give notice of such election within the time prescribed, the costs of the complainants are to be paid out of the fund in court; and the injunction is to be made perpetual as against all of the defendants.

As to the fund in court, it is admitted by all parties, that it is a proper case for the defendants to interplead and settle the matter between themselves; and one of them asks that this may be done by filing a bill for that purpose, and that he may be the complainant therein. As to the mode of proceeding after it is ascertained that a bill of interpleader is properly filed, there does not appear to be any settled practice. In the case of *Manks v. Atkinson & Holroyd*, (1 Cowen's R. 696,) the cause was brought to a hearing on bill and answer only; but whether this was done by consent of the parties, or otherwise, does not appear. In the case of *Jones v. Gilman and others*, (Cooper's R. 49,) the complainant filed a replication to the answers, and served subpoenas to rejoin; according to the practice as stated in the marginal note in *Dickins*, (1 Dick. R. 291, n.) It also appears from the English reports that the testimony is sometimes taken, as to the rights of the defendants between themselves, previous to a decree to interplead. (*Beymer v. Buchanan*, 1 Cox's Cas. 425. *Duke of Bolton v. Williams*, 4 Bro. C. C. 297) In this

cases, and also where the right of one defendant is admitted by the answer of the other, or the bill is taken as confessed as to one, the court settles the rights of the parties at once, and makes a final decree as to those rights, and as to the disposition of the fund in controversy. (*Hodges v. Smith*, 1 Cox's Cas. 357.)

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Where the defendants, or any of them, deny the allegations in the complainant's bill, or set up distinct facts in bar of his right to file the bill, he must file a replication, give rules to produce witnesses, and close the proofs in the usual manner, before the cause is heard; as the defendants, as well as the complainants, are at liberty to read proofs on those questions at the hearing. (*Stratham v. Hall*, Turn. & Russ. R. *30.) But if the defendants admit the facts on which the right to file the bill of interpleader rests, and set up no defence, in opposition thereto, which requires the taking of testimony on either side, it seems to be sufficient for the complainant to file a replication to the answers of the defendants, and then to set down the cause for hearing and for a decree that they interplead and settle the matter between themselves, without waiting until the cause is ripe for a decision as between the defendants. In that case the court merely decides that the bill is properly filed, and dismisses the complainant with his costs of the litigation, up to that time, to be paid out of the fund. And to settle the conflicting claims of the defendants, the court directs either an action, an issue, or a reference to a master, as may be best adapted to the circumstances of the case. (*Angel v. Hadden*, 16 Ves. jun. 203. 4 Bro. C. C. 309, n.) In this stage of the suit, an issue or a reference will in general be the most cheap and efficacious mode of settling the controversy between the defendants; and the expense of an action at law, or of an original bill, filed under the direction of this court, can seldom be necessary.

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The present case involves so many conflicting claims and questions of partage, that it would be very incon-

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venient to settle them by awarding issues to be tried by a jury; and the filing of a bill would produce great and unnecessary delay and expense. I think, therefore, the proper mode of ascertaining and settling the rights of these defendants, is to refer it to a master to examine and report which of them is entitled to the fund which has been deposited in this suit; and if the master shall be of opinion that any two or more of the defendants are equitably entitled to share in the same, that he also ascertain and report what portion of the fund belongs to each. In this case, also, as many of the facts, on which the claims of the respective parties rest, are probably known only to the other defendants, or some of them, either party, previous to the examination of any witnesses before the master, and for the purpose of obtaining a discovery, may present to the master, on oath, a written statement of such claim, and of the facts and circumstances on which it is founded; which statement all the other defendants shall answer on oath, to the satisfaction of the master, and with the like effect as if such answer was filed to a bill of discovery: The defendants who have made a joint claim, to join in their statement of such claim. Either party is to be at liberty to take out a summons, and proceed before the master in such manner as the master may direct; and the solicitor of each defendant is to have notice of any proceedings in which a notice of such proceedings is required by the practice of the court. And all questions of costs, as between the defendants, and all other questions and directions are reserved until the coming in of the master's report; but with liberty to either party to apply for such other instructions, or directions to the master, as may be necessary or proper pending the reference.

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Souzer
v.
De Meyer

SOUZER AND WIFE v. J. DE MEYER AND N. DE MEYER.

A defendant cannot plead and answer, or plead and demur, as to the same matter.

If he answers as to those matters which by his plea he has declined to answer, he overrules the plea.

So if a plea and demurrer are to the same part of the bill, the demurrer is overruled.

If the defendant is willing to give the discovery sought by the bill, and has a defence which might be pleaded in bar, he will have the full benefit of such defence, if he sets it up, and insists upon it in his answer.

Where the complainant sets up equitable circumstances in his bill, in anticipation of a plea and to defeat the same, the defendant must support his plea by an answer as to those equitable circumstances, in addition to the general denial thereof in the plea.

If the answer admits, or does not fully deny such equitable circumstances, they may be used on the argument to falsify the plea.

And if they are denied by the plea and the answer, the complainant may take issue on the plea, and prove the same.

If the plea is falsified by the proofs, the complainant will be permitted to examine the defendant on interrogatories, if a discovery is necessary.

If a plea is bad in form only, but good in substance, as to the whole or any part of the relief sought by the bill, and was not pleaded in bad faith, it will be permitted to stand as a part of the defendant's answer, or the defendant may be permitted to insist upon the same matters in his answer.

The statute of limitations may be interposed against legacies, if not charged upon the land, as well in equity as at law.

*Where a suit comes up by an appeal from a vice chancellor, if the present vice chancellor of the circuit from which the suit came was originally of counsel in the cause, the suit will be retained by the chancellor.

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THIS was an appeal from a decretal order of the late **August 29th.** vice chancellor of the second circuit. The defendants plead the statute of limitations to the whole bill, and at the same time put in an answer denying the whole equity thereof. The vice chancellor made an order, declaring, among other things, that the statute did not apply, and was no defence to the matters and charges contained in

1881. the bill; and for that reason he overruled the plea, with
 Souzer liberty, however, to the defendants to insist on the statute
 v. in their answer as a defence.
 De Meyer.

L. Elmendorf, for the appellants. The statute of limitations is a bar to the complainants' right of recovery. A demand to be exempted from the operation of the statute, must be exclusively of equity jurisdiction. Here the complainants had a remedy at law for the legacies claimed by them in their bill. Wherever a devisee enters upon land, avowedly under a devise, subject to the payment of a legacy, charged thereon by the will, a promise to pay the legacy may be implied. Here, we admit, we have made payments towards these legacies, which are evidence of, and equivalent to an express promise. The liability at common law, in such cases, is not put upon the promise, but upon the consideration received by the devisee, from which a promise is implied. (*Beecker v. Beecker*, 7 John. R. 99. *Van Orden v. Van Orden*, 10 id. 30. *Kane v. Bloodgood*, 7 John. Ch. R. 90. *Murray v. Coster*, 20 John R. 576. *Goodrich v. Pendleton*, 3 John Ch. R. 390. *Kelsey v. Deyo*, 3 Cowen's R. 133.)

B. F. Butler, contra. The legacy being charged on the land, the complainants have no remedy for the same at common law; and the statute of limitations cannot therefore be pleaded in bar of a recovery in this court. To give a remedy at common law, there must be either an express promise to pay on the part of the devisee, or a part payment by him, from which a promise may be implied. The legatee cannot charge the land in the possession of the devisee, *except by a bill in equity. We allege also the insolvency of one of the devisees. A suit at law against him would, therefore, be nugatory. (*Bailey v. Jackson*, 16 John. R. 210. *Pelletreau v. Ruthbome*, 18 id. 428. *Tole v. Hardy*, 6 Cowen's R. 333. *Birdsall v. Hewett*, 1 Paige's R. 32. *Cook v. Grant*, id. 407.) But

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here, the plea and the answer being to the same matter, the plea was overruled by the answer. The order of the vice chancellor overruling the plea was therefore correct, for this cause.

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THE CHANCELLOR. It is a well settled principle of equity pleading, that the defendant cannot plead and answer, or plead and demur, as to the same matter. If he pleads to any part of the bill, he asks the judgment of the court whether the matters of the plea are not sufficient to excuse him from answering so much of the bill as is covered by the plea. Therefore, if he answers as to those matters which by his plea he has declined to answer, he overrules the plea; and if he demurs to any part of the bill, and also puts in a plea, which is a special answer to the same part, the demurrer is overruled. If he is willing to give the discovery sought by the bill, and has any defence which might be pleaded in bar of the relief sought, he will have the full benefit of such defence, if he sets it up and insists upon it in his answer. This is always the better course, where the expense of a full answer will not be great; especially if there is any doubt as to his right to set up the particular defence by way of plea.

In some cases, where the complainant anticipates the plea, and sets up equitable circumstances in his bill to defeat the same, the defendant is not only permitted, but actually required, to support his plea by an answer as to those equitable circumstances. This, however, is only an exception to the general rule; and the answer is not put in as a defence, but to give the complainant the benefit of a discovery to defeat the plea, which only contains a general denial of the equitable circumstances. Even in that case the plea does not profess to cover the *discovery* as to those particular allegations in the bill. If they are admitted, or not fully denied by the answer, it may be used, on the argument of the plea, to *counter-prove the same. If they are denied, the complainant still has an

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1831. opportunity to contradict the general denial in the plea, and the particular denial in the answer, by taking issue on the plea. And if the plea is falsified by the proofs, the complainant will not lose the benefit of his discovery as to the other matters in the bill, but may still examine the defendant on interrogatories, if a discovery is necessary. (Lube's Eq. Pl. 237, 335, 342. Mitf. 277, 302; 4 Lond. ed.) In the case now under consideration, the defendants have answered, as well as pleaded, to the whole of the charges in the bill, although no equitable circumstances were set up in anticipation of the plea. It is very evident, therefore, that this plea is overruled by the answer.

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If the plea was bad in form only, but good in substance, as to the whole, or any part of the relief sought by the bill, and was not put in by the defendants in bad faith, the same should have been permitted to stand as a part of their answer, or they should have been allowed the full benefit of insisting upon the statute in their answer. But as the order has been drawn up in this case, although the defendants are to be permitted to insist upon the statute in their answer as a defence, it is somewhat doubtful, at least, whether they would not be precluded, on the final hearing, by the preceding part of the order, which declares that the statute is no defence to the matters and charges in the bill.

As to so much of the bill as seeks for a discovery and satisfaction of that part of the legacies which was not charged upon the land, I apprehend the statute would be a valid bar. The statute of this state having given a concurrent remedy in this court and in a court of law, to recover such legacies, it seems to follow that if the statute would be a good bar in an action at law for the legacy, it should be equally so on a bill filed in this court, for the same kind of relief. Whether the same principle would apply to the legacies chargeable on the land, after the defendants had subjected themselves to the payment

thereof personally, or whether the complainants can call for an account for the period of twenty years in analogy to the limitation of actions at law to recover the *possession of real estate, are questions not necessary to be decided on this informal plea. Those questions can be discussed more profitably at the hearing, when all the facts are before the court.

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I think the order of the vice chancellor should be so modified as to strike out that part thereof which declares that the statute does not apply, and is no defence to the matters and charges in the bill; so as to leave the whole question, as to the merits of that defence, open for discussion at the hearing, if the defendants think proper to amend their answer, and insist upon the statute as a bar to all or any part of the complainant's claim. The costs on this appeal must abide the event of the suit. And as the present vice chancellor of the second circuit was formerly counsel in the cause, the further proceedings in the case must be had before the chancellor; the defendants to have thirty days, after notice of this decision, to file a supplemental answer by way of amendment for the purpose of insisting upon the statute.

BROCKWAY AND MCFARLAND v. COPP.

Where, upon an appeal by a defendant from an interlocutory decision of a vice chancellor, such decision is reversed by the chancellor, with costs, and no order is obtained to remit the proceedings to the vice chancellor, the defendant may either cause the order to be enrolled, and obtain an execution for his costs on the appeal, or he may proceed as for a contempt, and apply for an attachment against the complainant for the non-payment of the costs.

THE defendant appealed from an interlocutory decision October 4th of a vice chancellor, refusing to modify an injunction.

1831. The chancellor reversed that decision, and modified the
Brockway injunction as prayed for on the original application to the
v. vice chancellor, and ordered the complainants to pay the
Copp. costs of the appeal; no one appearing on the hearing of
the appeal, in their behalf, to oppose the defendant's
application. No order was made to remit the proceedings
on the appeal to the vice chancellor. But the defendant
procured his costs on the appeal to be taxed, and caused
[*579] them to be demanded of *the complainants, according to
the provision of the 171st rule, and then applied to the
chancellor, ex parte, for an order to commit the complain-
ants, according to the direction of the statute, for the non-
payment of these costs.

E. W. Leavenworth, for the defendant.

THE CHANCELLOR. As the proceedings on this appeal were not remitted to the vice chancellor to carry into effect this order for the payment of costs, there can be no doubt that the application is properly made to the chancellor, to enforce their collection. The only doubt which suggested itself to me, in this case, was whether this was one of the cases provided for by the fourth section of the title of the revised statutes, which relates to proceedings as for contempts to enforce civil remedies, and to protect the rights of parties in civil actions, (2 R. S. 535;) or whether the defendant was not bound to procure the order of this court, on the appeal, to be enrolled, and to take out execution thereon, in the usual manner, as on a final decree. The third subdivision of the first section of that title of the revised statutes, seems to limit the power of the court to commit a party, for the non-payment of any sum of money ordered to be paid, to those cases where, by law, an execution cannot be awarded for the collection of such sum. (2 R. S. 534, § 1, sub. 3.) By the 104th section of the title which relates particularly to this court, (2 R. S. 183,) the performance of any decree, or obedience thereto, may be

enforced by execution against the body, or against the goods and chattels, lands and tenements of the party, against whom the decree was made. I have no doubt that this court, on an appeal from an interlocutory decision of a vice chancellor, may make a decree respecting the costs on such appeal, which will authorize the party to enrol the same and to take out an execution against the person, or the property of the party, against whom such costs are adjudged. (See 2 R. S. 613, § 2.) Such indeed is the practice of this court in relation to costs awarded in the court for the correction of errors, on appeals from interlocutory orders of the chancellor. The decree of the appellate court, *in such cases, is a final decree, so far as respects the costs awarded on the appeal; and those costs may be collected on an execution in the usual manner.

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By the former practice of this court, however, the remedy of the party might have been enforced, in all cases, by attachment or process of sequestration; although the court was authorized to enforce the performance of its decrees by a common law execution, against the property or the body of the party against whom the decree was made, as is provided for in the present statute. (1 R. L. of 1813, 487, § 4.) And by the eighth subdivision of the first section of the title before referred to, (2 R. S. 535, § 1, sub. 8,) proceedings as for a contempt may be resorted to in all cases where attachments and proceedings as for contempts have been usually adopted and practised in courts of record, to enforce the civil remedies, or to protect the rights of any party to a suit.

I conclude, therefore, that it was optional with the appellant in this case to have the decree of the chancellor, awarding costs on the appeal, enrolled, and to take out a *fieri facias*, or *capias ad satisfaciendum* thereon; or to apply for a precept to commit the complainants to prison until those costs were paid, and without incurring the useless expense of an enrolment.

An order must therefore be entered, authorizing the

1831. <hr style="width: 100%;"/> Lindsay v. Jackson.	issuing of such a precept, for the amount of the costs as taxed, by the vice chancellor, and for the expenses of this application.
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*LINDSAY AND OTHERS v. JACKSON AND MCJIMPSEY.

Equity requires that cross demands should be set off against each other. And in a case not within the statute of set-off, chancery will permit an equitable set-off, if, from the nature of the claim, or the situation of the parties, justice cannot be obtained by a cross action.

The insolvency of one of the parties is a sufficient ground for the court to exercise its equitable jurisdiction, in allowing an equitable set-off.

And a set-off will be allowed, on the application of the complainant, where the defendant is insolvent; although the debt of the complainant to the defendant is not due.

Otherwise, if the debt of the defendant to the complainant is payable at a future day.

October 4th. THIS was an appeal from a decision of the vice chancellor of the first circuit. In May, 1831, the complainants gave to the defendants two negotiable promissory notes, for the sum of about \$1500 each, payable in six months, without interest. About the same time the defendants became indebted to the complainants, on an acceptance for \$4000, payable on the 13th of June. A few days before this acceptance became due, the defendants became insolvent, and stopped payment. In July, 1831, the complainants filed their bill in this cause to restrain the defendants from negotiating or transferring the notes; and praying that the amount to become due thereon might be set off, or applied in part satisfaction of the \$4000 due on the acceptance. An injunction having been granted, according to the prayer of the bill, the defendants applied to the vice chancellor for a dissolution of the same. The vice chancellor denied the motion; and from that decision, the defendants appealed to the chancellor.

B. F. Butler, for the complainants.

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J. Hoyt, for the defendants.

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THE CHANCELLOR. There is a natural equity that cross demands should be off-set against each other; and that the balance only should be recovered. This was the rule of the civil law, and it is now adopted and preserved as the law of those countries, where the principles of the civil law prevail. *(Code Nap. lib. 3, tit. 3, § 4. Institutes of Law of Spain, lib. 2, tit. 11, ch. 2, § 6. Van Der Linden's Inst. of Law of Holland, lib. 1, ch. 18, § 4. 2 Bell's Com. on Law of Scotland, ch. 4, § 2, p. 124.) By the common law of England, however, this natural equity was not allowed or enforced in the courts of law; but each party was left to recover his demand in a separate action. As a general rule, the court of chancery followed the rule of law; and after the statute had permitted set-offs to a certain extent, in suits at law, this court also adopted and acted on that principle. But the court of chancery, even before the statute, recognized the principle of natural equity, and acted upon it in cases where the law could not give a remedy in a separate suit in consequence of the insolvency of one of the parties. Thus in *Harokins v. Freeman*, (2 Eq. Ca. Abr. 10,) which was decided by Lord Macclesfield five years before the statute of set-offs was passed, the court of chancery interfered to enforce this natural equity, as between the administrator of an insolvent estate and the complainant, between which complainant and the intestate there were mutual demands. The same principle of natural equity was recognized by Lord Chief Justice Hale many years before. (*See Chapman v. Derby*, 2 Vern. 117.) And at this day, if the court finds a case of natural equity, not within the statute, it will permit an equitable set-off, if, from the nature of the claim, or from the situation of the parties, it

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Lindsay v. Piggott v. Williams, Mad. & Geld. R. 95.)

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Where there are mutual demands between the parties which cannot be set-off under the statute, but which a court of equity may compensate or apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of the equitable jurisdiction of the court of chancery. (*Vide Lord Lanesborough v. Jones*, 1 P. Wms. 325.) In *Pond v. Smith*, (4 Conn. R. 302,) the supreme court of Connecticut held that the insolvency of one of the parties was a sufficient ground for the interference of a court of chancery to off-set mere legal demands against each other, although they *were so situated as to be incapable of being set-off at law; and that the complainant ought not to be left to pursue his legal remedy against the defendants, when, from their insolvency, no satisfaction of his demand could be thus obtained. And in *Searchet v. Admr. of Searchet*, (2 Hamm. Ohio R. 320,) the supreme court of Ohio, on a bill in equity, permitted the complainants to off-set an equitable balance due to them from their co-partner, against a joint bond given by them to him; although, from the unliquidated nature of their claim, there could be no set-off at law. In *Collins v. Farquar*, (1 Litt. R. 153,) the court of appeals in Kentucky recognized the principle that the insolvency of the defendant will, in equity, give the court jurisdiction to decree a set-off of a demand against him, which might be recovered in an action at law, if he was solvent. And in delivering the opinion of the same court, in the case of *Robbins v. Hawley*, (1 Monroe's R. 194,) Judge Owsley says: "Robbins is admitted to be insolvent, and Dodge must be understood from the proceedings to be out of the country and it will not be denied but that those facts are sufficient, in general, to warrant a court of equity in taking cognizance of a cause, for the purpose of setting off demands,

which, from a lack of connexion, could not otherwise be decreed in a court of equity." (*See also Price v. Richards' Admr.*, 4 Bibb's R. 356, and *Ball v. Townsend*, Litt. Sel. Ca. 325.) The same principle is recognized in the law of Scotland, where, in ordinary cases, a debtor is not allowed to avoid the payment of what is liquidated and payable, during a long litigation on an unliquidated counter claim; yet there is an exception to that rule, in case of bankruptcy. For a solvent debtor will not be compelled to pay the liquidated debt, and come in with the other creditors for his illiquid claim; but he may plead compensation. (1 Bell's Law Dict. 258, art. Compensation.) The general principles of set-off are recognized and authorized by a public statute in that country, as well as here. But the learned commentator on the law of Scotland says, the statute is in no degree exclusive of the operation of equity naturally falling under its rules; and that the insolvency of a party has always been admitted as a ground for administering an equitable remedy, *unknown to the ordinary course of law. (2 Bell's Con. 127.) In the case of *Simpson v. Hart*, (4 John. R. 63,) the court of errors in this state, on appeal from this court, permitted a set-off in a case where it was evident no set-off could have been plead at law, if the defendant had brought his action against the complainant on his judgment; because the two judgments off-set were not between the same parties. Judge Spencer, who delivered the opinion of the court of errors in that case, considers the fact of the insolvency of the defendant a material allegation in the cause, and puts the decision substantially on that ground.

It is true that Judge Story, in the case of *Green v. Darling*, (5 Mason's R. 201,) refused a set-off in equity, because, by the law of the state where the contracts were made, one judgment could not be off-set against the other, under the statute. But it must be recollected he was administering the law of a state which had no court of

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equity; and as no right of set-off had been declared by the laws of the state, and no court had been organized therein to give a remedy, except in the courts of law, the extent of the remedy showed the extent of the right as it existed in that state. In page 207 of the report, Judge Story says: "I do not speak here of cases where distinct equities arise from other sources, but upon the naked equity of distinct and unconnected debts, and independent of any statutable regulations." He subsequently explains what he means by new or distinct equities. And I think it is pretty evident he does not mean to say that the total insolvency of the defendant might not be a sufficient equity to authorize a court of chancery to interfere, if the contracts had been made in a state where equitable jurisdiction was vested in any of its courts; although he expresses no definite opinion on that question.

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It remains to be seen whether the fact, that the defendants' notes against the complainants have not yet become payable, forms any valid objection to the claim of the latter to have them applied in payment of their debt which is now due from the defendants. As the notes are not on interest, there can be no injustice in compensating the defendants, for the amount *to become due thereon at a future day, by a present payment. The complainants alone had any interest in obtaining the time of credit which was given on these demands. It might present an entirely different question if the defendants' debt was now due from the complainants, who were seeking to compensate it by a claim against the defendants, payable at a future day. (*See Young v. Guy*, 10 J. B. Moore's R. 193.) But the case now under consideration seems to come within the principle laid down by Pothier, (Pothier on Ob. 590,) that a debt of a specific thing may be opposed to a general debt of the same kind, which necessarily includes the specific thing. He put the case thus: "I am your creditor for six pipes of wine of a particular vintage: you are my creditor for six pipes of wine generally. I may

demand the six particular pipes, and therefore you cannot off-set the general debt for six pipes. But I may off-set my particular pipes, if I please, against yours, because I could turn them out to you in payment of the general debt." Here, the defendants could not claim present payment of their notes, due six months hence, and therefore it would be inequitable for them, by an off-set, to compel the complainants to pay those notes before they became due. But as the debt of the defendants is due, and if they paid it immediately, according to their agreement, the complainants might, without any injustice to the other party, waive the time of credit which was for their own benefit, and pay the notes immediately with the money thus received, the defendants have no cause to complain of such a mode of compensating one debt by another.

Under the circumstances of this case, as disclosed in the complainants' bill, I think it would be inequitable and unjust to permit the defendants to dispose of these notes, either for their own private purposes, or in payment of their general or favorite creditors, leaving the complainants' debt unpaid. Although equality among creditors is equity, here is a prior and a paramount equity, which must first be provided for. An equity, which is distinctly recognized by the insolvent acts of this state which have also declared the other principle, and enforced it to a certain extent.

*The decision of the vice chancellor in refusing to dissolve the injunction was therefore right. It must be affirmed, with costs; and the proceedings are to be remitted to the vice chancellor.

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MORRIS AND OTHERS v. MOWATT AND OTHERS.

Where a purchaser at a master's sale purchases under the assurance that he is to receive a perfect title, if such title cannot be given he will not be compelled to complete the purchase.

Neither can he be compelled to receive a good legal title, if it is liable to be litigated in consequence of some valid equitable claim which may be brought against it.

He is not obliged to accept a mere equitable title, or a title which is doubtful.

The purchaser has a right to require, under such circumstances, a title which is good both at law and in equity.

A judgment, as soon as it is docketed, becomes a general lien at law, on all the real estate of the debtor, not only as against himself, but also as against all other persons deriving title through or under him, subsequent to such judgment.

The lien, however, may, in some cases, be displaced by the execution of a power which overreaches the judgment.

But if a purchaser, acquiring a title under the execution of such power, has notice that the power is improperly or inequitably executed, a court of chancery will enforce the lien of the judgment as against such title.

So the lien of the judgment may be removed by a decree of the court of chancery, where the judgment debtor holds the legal estate in the land merely as a naked trustee for another, or where there is a subsisting equitable claim against the premises, which is prior in point of time to the lien of the judgment.

Debts due by the testator are equitable liens upon his estate in the possession of his heirs or devisees, and prior in time to judgments recovered against them for their individual debts.

But the judgment creditors of the heirs or devisees have a right to ask for the application of the personal estate, in the first place, to the satisfaction of the debts due by the testator, or that they be substituted in the place of the creditors of the testator as to such personal estate.

Before foreclosure, a mortgagee cannot maintain ejectment to recover possession of the mortgaged premises, and he has no interest in such premises which can be sold on execution; and before an entry under his mortgage, he is not bound, as an assignee of the mortgagor, by a covenant running with the land.

The revised statutes have prescribed a new mode, by a bill in equity, of proceeding against heirs and devisees to obtain satisfaction of the debts due from the estate of the testator or intestate.

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• A final decree in such suit has a preference, as a lien on the estate descended or devised, over any judgment or decree obtained against the heir or devisee for his personal debt.

And a sale under an execution, issued upon such decree, will overreach, not only all judgments and decrees which have been recovered against such heir or devisee, but also all mortgages and alienations of the estate, subsequent to the commencement of the suit.

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Whether a sale under execution issued on the decree is necessary to give the purchaser a legal title, sufficient to protect him at law against a sale under a previous judgment against the heir or devisee? Quere.

JOHN MOWATT, jun. by his will, made in 1820, devised October 4th a part of his real estate to his wife, during her widowhood; and after making certain pecuniary and specific bequests and legacies, he devised all the residue of his estate to his three sons, Charles Mowatt, James Mowatt, and John E. Mowatt, share and share alike. He also authorized his said three sons, who were appointed executors of the will, to sell any part of the real estate, for the payment of his debts or to carry into effect the uses and trusts of the will. After the death of J. Mowatt, jun. the complainants filed a bill against his executors, to obtain payment of a debt due them from the testator. In November, 1828, a final decree was made in that cause, establishing against the executors a debt of about \$16,000, and directing it to be paid out of the estate of the testator in their hands. Previous to the making of this decree, Charles Mowatt mortgaged his interest in a part of the real estate of his father to the Phoenix Fire Insurance Company, and several judgments had been recovered against the devisees respectively, for their own debts, which were liens on their interests in the estate so devised to them by their father, John Mowatt, jun. The complainants being unable to find personal estate in the hands of the executors to satisfy this decree, filed their bill in this cause against Charles and James Mowatt, as the devisees of their father, and also against the widow of the heir at law of J. E. Mowatt, the other devisee, who was then dead, to obtain satisfaction of their debt out of the real estate of their testator so devised to his three sons by his will. The Phoenix Fire Insurance Company and

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Robert Lenox, who held a mortgage against the estate executed by the testator in his lifetime, were also made parties defendants *in the suit; but none of the judgment creditors of the devisees were made such parties. In November, 1830, a decretal order was made, referring it to a master to inquire and report, among other things, the amount due to the complainants, and the amount due to R. Lenox and the Phoenix Fire Insurance Company, on their mortgages respectively. This decretal order further authorized the master to take an account of the personal estate which belonged to the testator, at the time of his death, and of the administration thereof by the executors, if thereto requested by any of the parties to the suit. The master made a separate report, stating that he had been requested by the devisees to take an account of the personal estate, and of the administration thereof, and finding that the taking of that account, and the account of what was due to the Phoenix Fire Insurance Company, would produce great delay, he had, at the request of the complainants and of Lenox, consented to make a separate report as to the amount due them respectively. He thereupon reported a balance due to the complainants of \$7582.22. He also reported that there was due to R. Lenox, on his mortgage, \$17,763.99, which was a specific and prior lien upon a house and lot in Pearl street, in the city of New York, which belonged to the testator at the time of his death. In January, 1831, a decretal order was made, founded on this separate report, directing the house and lot in Pearl street, and five houses and lots on Franklin street, to be sold by a master; and the master was directed out of the proceeds of the house and lot in Pearl street, to pay the amount due to Lenox, and to bring the residue of the proceeds of the sale into court.

Under this decretal order, the master put up and sold at auction the Pearl street house and lot, and the same was purchased by Jacob S. Platt, for the price or sum of \$33,250. The lot was sold by the master, upon the u-

derstanding that the purchaser was to have a good and perfect title to the lot, under the decretal order of the court. The purchaser paid down 10 per centum on the amount of his bid, at the time of the sale; but being afterwards advised by his counsel that his title under the decree would not be perfect, *he declined completing the purchase. The complainants thereupon presented a petition to the court to compel him to pay the residue of the purchase money, according to his bid, on the sale by the master.

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D. S. Jones, for the complainants.

T. Fessenden, for the purchaser.

THE CHANCELLOR. The purchaser in this case bid off the premises in question, at the master's sale, under the understanding, expressed at the time of the sale, that he was to have a perfect title under this decree; and if the master's deed will not give him such a title, he must be discharged from the obligation of his purchase; unless the parties interested in the sale can procure a discharge of the outstanding claims and incumbrances.

It is not necessary that I should particularly notice the mortgage given by two of the devisees to their mother, to secure her annuity. As she is dead, the annuity is at an end; and probably the arrears were paid up to the time of her death. If this was the only question in the cause, the master would be directed to inquire and ascertain whether any thing remained due on that mortgage; unless the parties elected to procure it to be cancelled on record.

The important question in this cause is as to the objection that there are outstanding judgments against each of the three devisees, and that the judgment creditors are not parties to this suit. The lot in question was not devised to the executors as such; but it was devised to the

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widow during her life or widowhood, with remainder to the three sons of the testator in fee, subject to the payment of debts, and subject to the power of the executors to sell for that purpose. Although the three sons are named in the will as executors, yet they do not take the real estate as such executors but as devisees thereof, and as tenants in common under the will. The judgments, therefore, which were afterwards rendered against them individually, became general liens on their several interests in the estate; and the question now presented is whether the purchaser under this decree will obtain a valid title, as against the lien of those judgments.

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*It is a well settled principle in this court, that a purchaser, who has contracted for a good title, will not be compelled to accept a mere equitable title, of which he cannot avail himself in a suit at law, to recover the property, or to defend his possession, if necessary. (*Abel v. Heathcote*, 2 Ves. jun. 100.) It is equally well settled, that this court will not compel a purchaser to accept a doubtful title. And even if he obtains a good legal title, yet if it is liable to be litigated in a court of chancery, in consequence of some valid equitable claim which may be brought against it, the purchaser will be discharged of his purchase. (*Grover v. Hugell*, 3 Russ. R. 428.) A sale, therefore, under a decree of this court, where the master, by the direction of the parties interested, professes to sell a perfect title, entitles the purchaser to a title which is good both at law and in equity. Is this then a title of that description? The moment a judgment is docketed, it becomes, at law, a general lien on all the real estate of the debtor; not only as against himself, but also as against all other persons deriving title through or under him subsequently to such judgment. It affects the legal estate, and the lien of the judgment cannot, at law, be detached or defeated by any species of alienation whatsoever. (1 Atk. on Conv. 505, 511.) The lien may indeed be displaced, in some cases, by the execution of a

power which overreaches the judgment. But if the purchaser has notice that the power is improperly or inequitably executed, a court of chancery will enforce the lien of the judgment, even as against the title acquired under such power. The lien of a judgment may also be removed or displaced by the decree of this court where the judgment debtor holds the legal estate in the land merely as a naked trustee for another, or where there is a subsisting equitable claim against the premises, which is prior, in point of time, to the lien of the judgment. (*Ex parte Howe*, 1 Paige's R. 130. 1 Atk. Conv. 512.)

In the case under consideration, the debts due from the testator to these complainants and others, were equitable liens upon the estate devised to his sons, which liens are prior, in point of time, to the judgments recovered against the sons for their own private debts. If the judgment creditors had been made *parties to this suit, these prior equities could have been established in favor of the creditors of the testator. And the judgment creditors would then have been perpetually enjoined from proceeding at law against the property sold under the decree in this cause. Being parties to the suit, they would have been entitled to contest the validity of the complainant's claim against the estate of the testator; and if that was established, they would then have the right to ask for the application of the personal estate, in the first place, to the satisfaction of that claim, if any such personal estate could be found; or, at least, that they might be substituted in the place of the creditors of the testator, as to such personal estate, on the principle of marshalling securities, if the real estate was applied to the payment of the debts of the testator in the first instance. And if no personal estate remained, they would still have had the right to insist that the real estate should be applied in payment of the testator's debts, in the manner directed by the will: That is, that the Pearl street property should not be sold for that purpose, until all the other property

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1881. of the testator, both real and personal, had been exhausted. It will be seen at once, that this would have raised the question, whether the Franklin street lots, on which the Phoenix Fire Insurance Company have a mortgage from some of the devisees, or the Pearl street house and lot, on which the lien of the judgments first attaches, should be sold to satisfy the complainant's claim.

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What then will be the situation of the purchaser under this decree, as to the security of his title; either at law or in equity? At law, the judgment creditors may sell the legal estate by execution on their judgments; and the purchasers will acquire a legal title, which will overreach the sale under this decree. And the judgments being obtained before the creation of a *lis pendens* here, by the commencement of this suit, the court of chancery cannot protect the present purchaser, by any order or injunction made in this cause, to which the judgment creditors are not parties. He will therefore be compelled to file a bill, even to protect himself against this assertion of a legal right on the part of the judgment creditors. And upon that bill, in order to protect his equitable *right to this property, he will not only be compelled to prove the existence of the debt alleged to be due from the testator to the present complainants, but he will also be required to litigate every question which the judgment creditors might have raised as an objection to the sale of this particular portion of the real estate of the testator. The fact that Lenox, one of the present defendants, has a mortgage on the Pearl street property, executed by the testator in his lifetime, does not materially alter the rights of the purchaser under this decretal order. It is now well settled in this state, that even at law, the mortgage is to be considered a mere security for the payment of a debt. Before foreclosure, the mortgagee has no interest in the land which can be sold on execution; and before entry under his mortgage, he is not bound, as an assignee of the mortgagor, by a covenant running with the land. (*Juck-*

son v. Willard, 4 John. R. 41. *Astor v. Hoyt*, 5 Wend. 603.) Under the provisions of the revised statutes, he cannot even maintain an ejectment to recover the possession of the mortgaged premises, before the mortgage has been legally foreclosed. (2 R. S. 312, § 57.)

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The revised statutes have prescribed a new mode of proceeding, by a suit in this court, against heirs and devisees, to obtain satisfaction of debts due from the decedent. And every final decree rendered in such suit, against the heir or devisee, has a preference, as a lien on the estate descended or devised, over any judgment or decree obtained against the heir or devisee, for his own personal debt. A sale upon an execution under such a decree, will, at law, not only overreach such judgments, but will also overreach all mortgages and alienations of the estate, which are subsequent to the commencement of the suit in this court. (2 R. S. 454.) But the decretal order, under which the present sale took place, is not such a final decree as is contemplated in the statute. And probably to give the purchaser a perfect legal title, sufficient in a court of law to protect him against a sale under the previous judgment against the heir or devisee, it may be necessary to issue an execution on the decree, and to have the property sold by the sheriff, in the usual manner. On this *point, however, I do not mean to be understood as expressing any definitive opinion.

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The conclusion at which I have arrived in this case is that the purchaser cannot obtain a perfect legal title under the conveyance from the master, sufficient to protect him against these judgments, which at law form a previous lien on the premises. And as it is admitted to be impossible to obtain releases of all the judgments, within any reasonable time, the purchaser must be discharged of his purchase, and the deposit must be restored to him. He is also entitled to interest on that deposit, and to the costs to which he has been subjected. At present, there is no fund under the control of the court out of which the inte-

1881. rest and costs can be paid; and as all parties have acted in perfect good faith in relation to this sale, the expenses must be paid out of the fund hereafter to be raised, if a second sale takes place. If no sale of the property is had, and no other way is provided for the payment, the charge must fall on the complainants personally. The question, as to the final disposition of this claim for interest and costs, is for the present reserved; with liberty for the purchaser to apply hereafter by petition, as he shall be advised.

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If all the parties to this suit consent to a re-sale of the property under the present decretal order, the master is to proceed and sell, subject to the legal and equitable rights of all persons, other than the parties in the cause and those who are bound by the decree. But in that case, the master should inform the bidders at such re-sale of the nature of the objections which exist against the title under such sale. If a re-sale, at the risk of the purchaser, is not deemed advisable by the parties interested in this matter, the complainants are to be at liberty to file a supplemental bill, for the purpose of bringing the judgment creditors before the court; or to apply for a rehearing, and to vacate the decretal order of the seventh of January last, as they may be advised. If a receiver is necessary to preserve the property, and to secure the rents and profits in the mean time, one will be appointed, as a matter of course, upon a proper application, and on due notice to such parties as have a right to be heard on that question.

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*BROWN AND OTHERS v. STORY.

Where one of several complainants dies pending the suit, and the cause of action survives, the surviving complainants, if they wish the suit to proceed in their names as survivors, must make a special application to the court for that purpose.

Where the surviving complainants are insolvent, the defendant, who had demands against the deceased and surviving complainants jointly, will be permitted to file a cross bill, in the nature of an original bill, against the surviving complainants and the personal representatives of the deceased complainant; and the proceedings in the original suit will be stayed until the cross suit is in readiness for a hearing.

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THE defendant, Story, commenced a suit at law against J. D. Brown, G. W. Brown and J. Brown, to recover a debt alleged to be due from them to him. The Browns then filed a bill in this court against Story for an account in relation to the same, and other matters, and obtained an injunction to restrain the proceedings in the suit at law. Story, in his answer, set forth his claims against the complainants; and also a large claim against J. Brown, one of the complainants individually. A replication was filed to the answer, and a reference made to a master to take an account of the transactions between the parties; reserving all further directions. Pending this reference, J. Brown died, possessed of a considerable property; but the other complainants are alleged to be insolvent. After the death of J. Brown, on a suggestion of his death and that the cause of action had survived, the surviving complainants obtained an order that the suit proceed in their names as survivors. An application having been made to set aside that order for irregularity, the complainants appeared and opposed the application; and it was ordered to stand over to a further day. On that day, the defendant's counsel having received no further instructions on the subject, the motion was denied. A new application was thereupon made, upon new papers, to set aside the order, or to stay the proceedings until the suit should be revived in the name of the personal representatives of J. *Brown; or for such other relief as the court might consider proper.

October 4th.

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B. F. Butler, for the complainants.

J. E. Lovett, for the defendant.

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THE CHANCELLOR. From the course which the former application took, and under the peculiar circumstances of this case, I do not think the defendant is precluded from making the present application, on the new facts disclosed. But I see no cause to alter the opinion which I then expressed, that this is a case in which the cause of action survived to the complainants. The order entered in the register's office, without a special application to the court, was clearly irregular. But as the other would have been granted on a special application, under the circumstances now disclosed, it is unnecessary to set it aside.

The separate claim of the defendant against J. Brown was not a proper subject of litigation in this suit. It was not the claim for which the defendant brought his suit at law; and it could not properly be joined in this suit with the matters which were in controversy between the defendant and all the complainants jointly. If Story has any just claim against the executors of J. Brown, for a separate debt due from their testator, he must either bring a suit against them at law, or file a bill in equity to substantiate and recover that demand. And if the surviving complainants in this suit were solvent and responsible, there could be no necessity for bringing the personal representatives of J. Brown before the court, previous to taking this account. But the defendant has lost his remedy at law against the estate of J. Brown, for any demand which existed against him jointly with the surviving complainants. And as they are alleged to be insolvent, so that he can obtain no benefit from the decree in this cause, if a balance should be found in his favor, it seems inequitable that he should be compelled to go on and take that account, in the absence of the personal representatives of the deceased complainant. If he would not be precluded by the decree in this cause from afterwards asserting *his claim against the estate of J. Brown, in equity, he must at least file a new bill and go through the same course of litigation the second time, in order to

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obtain any balance which may be justly due him. He must therefore be permitted to file a cross bill, in the nature of an original bill, against these complainants and the personal representatives of John Brown, setting forth his joint claims, and alleging the insolvency of the survivors, by which he is compelled to resort to the estate of John Brown.

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If the defendant files such cross bill within one month, and prosecutes it with due diligence, the proceedings on the reference must be stayed until that cause is in readiness for a hearing, or until the further order of the court; so that only one accounting between the parties may be necessary.

IN THE MATTER OF PETTIT, A LUNATIC.

The chancellor has no authority to order the sale of the real estate of a lunatic; unless it be necessary for the payment of his debts, or the maintenance of the lunatic, or his family, or for the education of his children.

And in neither of these cases can it be done, if there is a personal estate sufficient for that purpose.

THIS was an application on the part of the committee of the person and estate of a lunatic for permission to sell her real estate. The petitioner stated in his petition that the personal estate of the lunatic amounted to less than \$1400, and that it produced an income of about \$80; that the real estate consisted of about 600 acres of land in the state of Ohio, and of the equal undivided eighth part of a house and lot at Sandy Hill, and of five other lots or pieces of land in this state; that the value of the lunatic's share of that portion of the real estate which is within the jurisdiction of the court, was worth about \$470, and produced an income of only \$21.75; that the income of her real and personal estate was not sufficient for her support; and that if her interest in the real estate was not

1831 sold, the owner of the seven eighths of the part thereof
 In the matter of Pettit. situate in this state would apply for a partition. The
 *committee therefore prayed that he might be authorized
 to sell her interest in the real estate, and invest the proceeds thereof for her use.

D. W. Bate, for the petitioner.

THE CHANCELLOR. There can be very little doubt that the interest of the lunatic would be advanced by a sale of her interest in all her real estate, except that which lies in the state of Ohio. The only question therefore is, whether this court has power to authorize such sale. Independent of the statutory provisions, this court has no authority to order a sale of freehold estate of a lunatic, even for the payment of debts; although the creditors, by filing a bill, might compel a sale. Thus, in the case of John Smith, a lunatic, it appeared that he was entitled to freehold estates, under the will of his father, subject to the payment of mortgages and bond debts charged thereon. A bill being threatened by the creditors to compel a sale, a petition was presented, praying that a specific portion of the estate might be sold for the payment of the debts. And although the heir at law and the next of kin of the lunatic consented to the prayer of the petition, Lord Thurlow decided that he had not jurisdiction in lunacy to authorize the sale. (*Ex parte Smith*, 5 Ves. 556.) The statute gives to this court authority to order a sale only in certain specified cases. And, however desirable it may be, under peculiar circumstances, to sell the property of a lunatic in cases not coming within the statute, it belongs to the legislature alone to afford the proper remedy.

The eleventh section of the title of the revised statutes, which provides for the custody and disposition of the estate of idiots, lunatics, persons of unsound mind, and drunkards, (2 R. S. 53,) authorizes an application for the

sale of the real estate, where it is necessary for the payment of debts. The sixteenth section authorizes a similar application, where the sale is necessary for the maintenance of the lunatic or his family, or for the education of his children. But in neither of these cases can the court direct a sale of the real estate for the payment of debts, or for the purpose of maintenance, so long as there is personal estate sufficient for that purpose.

1831.
In the matter
of Pettit.

*To obtain a sale for the purpose of maintenance, the committee must show that the principal and interest of the personal property, and the rents and profits of the realty, are not sufficient to support the lunatic.

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In the case under consideration, the mere income of the property is nearly sufficient for the support of this young woman, without breaking in upon the principal of the personal estate. And, at the present rate of expenditure, she may be supported more than twenty years, before the personal estate will be exhausted. This is nearly the average extent of the lives of healthy persons of her age; and, as her constitution is stated to be but indifferent, the probability is, if her lunacy continues, that there will never be any necessity for selling the real estate for her support. But, if there was only sufficient personal estate to support the lunatic for a single year, the court has no authority to order the real estate to be sold until such personal estate is exhausted. I do not intend to lay down the rule that no application can be made, until the committee has actually exhausted all of the personal property. But it must be so far diminished that the court can see that it will probably be expended before the proceedings to sell the real estate can be consummated, so as to make the proceeds thereof available for the purposes of maintenance.

It might sometimes be beneficial to the estates of persons in this situation, if the court had a general power to authorize a sale in all cases, in the discretion of the court, as in the case of infants. But when we take into consid-

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Postley.

[*599] eration the danger to which the property is exposed in the hands of committees, who are only required to give personal security, it is perhaps a circumstance not to be regretted, that the legislature have only conferred upon this court the power to authorize a sale in the two specified cases. I see no difficulty in making partition of the lands in this case, either by agreement of the parties, under the sanction of the court, according to the eighty ninth and ninetieth sections of the partition law, (2 R. S. 331,) or by proceeding under the general provisions of the statute for that purpose. The fact, that some particular portions of the property cannot be divided, *does not render a sale thereof necessary. That part may be assigned to the owner of the seven eighths thereof, and the share of the lunatic may be assigned from the other portions of the estate.

As the court has no authority to authorize the sale asked for in this case, the petition must be dismissed.

LEGGETT v. POSTLEY.

A defendant cannot be compelled to answer a charge in the complainant's bill, which, if true, would subject him to an indictment, or a criminal prosecution.

A fraudulent combination to commence suit against a person, with the view of extorting money from him, is an indictable offence, and the persons guilty of it may be punished for a conspiracy.

To sustain a bill of discovery, filed in aid of a defence at law, the complainant must show, in his bill, that the discovery prayed for is material to his defence at law, and also that his defence at law cannot be established by the testimony of witnesses, or without the aid of the discovery which he seeks.

A discovery will not be allowed, merely to guard against anticipated perjury in a suit at law.

October 4th. This cause came before the court on a demurrer to a bill of discovery. The complainant alleged that he had

been president of the Franklin Bank, previous to its failure. That in December, 1826, he was induced to become such president, by the solicitations of some of the directors, and other persons interested in the institution. That, on investigating the affairs of the bank, he found that many frauds had been committed by former officers, which had diminished and put in hazard the capital of the bank; against all of which acts he signed a formal protest, in writing, (which was set out at length in the bill,) and placed the same in the hands of one of the directors, to be preserved. That, during the time he was president, he improved the funds of the bank at least \$300,000. That, notwithstanding his exertions for the benefit of the creditors and stockholders of the institution, the defendant, Postley, from unfriendly and vindictive motives, had procured a combination of individual creditors of *the bank to be formed, for the purpose of instituting suits against the complainant in his individual capacity, in order to render him and his property liable. That Postley had made to the other conspirators fraudulent misrepresentations of the complainant's conduct, to induce them to join in the combination; and had represented to them, that by bringing suits against the complainant he would be induced to compromise. That in prosecution of the views of these conspirators, Postley had sued the complainant in the superior court in the city of New York, and had procured and induced one O. Pool to commence another suit against him in the circuit court of the United States. That the defendant, in the suit brought by him, relied principally upon a return of the state of the bank made to the legislature in March, 1828; but that the complainant had no agency in making that return, and did not see it until after it had been filed, it being the sole act of the cashier. That the return was never seen by Postley, and that he had no knowledge of the same until after the failure of the bank, and that it could not therefore have induced him to credit the bank.

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 Leggett
 v.
 Postley.

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Leggett
v.
Postley.

That the defendant also averred in his declaration in the superior court, that the complainant, to induce him to continue his account with the bank, had represented to him that the company was solvent and safe, &c., which allegation was not true. And the defendant was called on to answer the several statements and charges contained in the bill; particularly as to the combination charged therein, and whether he knew of the false return made to the legislature; and whether a knowledge of such false return induced him to give credit to the bank. An injunction having been granted to restrain the proceedings of the defendant in his suit at law, on an application to the chancellor the injunction was dissolved. The defendant afterwards put in a demurrer to the whole bill, for want of equity; and he assigned therein, as special causes of demurrer, that it did not appear from the bill that the discovery sought was necessary or material to the complainant's defence at law; and also that the discovery of the alleged conspiracy would subject the defendant to a criminal prosecution.

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**G. Brinckerhoff*, for the complainant.

Hugh Maxwell, for the defendant.



THE CHANCELLOR. The defendant cannot be compelled to answer a charge which, if true, will subject him to an indictment, or expose him to a criminal prosecution. The substance of the allegations in the bill is, that the defendant has entered into a fraudulent combination with others, to extort money from the complainant. That he has entered into an agreement with other creditors of the Franklin Bank, falsely to move and maintain certain suits against Leggett, which the confederates, and particularly the present defendant, knew to be unjust and unfounded; and by that means to compel the complainant to compromise with them for their claims against the bank, to relieve

himself from those prosecutions. It is evident, that if the charges in this bill are true, the defendant and the other parties to the combination are guilty of an indictable offence, and may be punished for a conspiracy. (1 R. L. 1513, 173, § 3. 2 R. S. 691, § 8.)

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v.
Postley.

To sustain a bill of discovery, in aid of a defence at law, it is necessary for the complainant to show that the discovery prayed is material to his defence in this suit at law; and if he does not show this by his bill, the defendant may demur to the discovery. (Mitf. Pl. 4th Lond. ed. 192. *Newkirk v. Willet*, 2 Caines' Cas. in Err. 296. *Selby v. Crew*, 2 Anstr. 504.) And where the complainant seeks to give jurisdiction to this court, on the ground that it was necessary for him to come here for a discovery; or when he asks the interposition of the court to stay a proceeding at law, either by a temporary injunction or otherwise, on the ground that a discovery is necessary to aid him in his defence, he must not only show that the facts as to which a discovery is sought are material, but he must also show affirmatively, in his bill, that his right or defence cannot be established at law by the testimony of witnesses, or without the aid of the discovery which he seeks. (*Gelston v. Hoyt*, 1 John. Ch. R. 547. *Seymour v. Seymour*, 4 id. 409. *Bullock v. Boyd*, 2 Marsh. Kent. R. 323. *Bass v. Bass*, 4 Hen. & Munf. R. 478. *Rees v. Parish*, 1 M'Cord's Ch. R. 60. *Russell v. Clark's Ex'rs*. 7 Cranch, 89.)

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In this case there is no material fact alleged to be in the knowledge of the defendant, which he could disclose without exposing himself to a prosecution for a conspiracy, if the allegations in the complainant's bill are true. The claim for a discovery of the non-existence of facts, essential to be established by Postley in his suit at law, is novel and wholly unprecedented. If these facts do not exist, it is impossible for the defendant to prove them in the suit he has brought against the complainant in the superior court, unless he is guilty of subornation of per-

1831. jury; and without the proof of these facts, it is impos-
 In the matter ble for him to recover in that suit. This court cannot
 of Sherryd. presume that it is material or necessary for the complain-
 ant to have a discovery, merely to guard against antici-
 pated perjury in a suit at law. The complainant's bill
 must, therefore, in this respect, be considered a mere fish-
 ing bill, to ascertain what proofs the defendant intends to
 produce against him in the suit brought in the superior
 court.

The demurrer is allowed, and the complainant's bill
 must be dismissed, with costs.[1]

IN THE MATTER OF P. SHERRYD.

A mere naked trustee, without interest, cannot become a petitioning cred-
 itor for an insolvent, without the consent of the *cestui que trust*, except
 in the cases specially provided for by the statute.

June 1st,
 1830.

THE Niagara Insurance Company was dissolved by an
 order of this court, under the statute, on the petition of
 the directors. The trustees, appointed on such dissolu-
 tion, presented a petition to the chancellor, asking per-
 mission to become petitioning creditors of Patrick Sherryd,
 an insolvent debtor, to enable him to obtain a discharge
 from his debts.

P. Griffin, for the trustees.

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*THE CHANCELLOR said he could find no provision in the
 revised statutes, except as to executors and administra-
 tors, which authorized a mere naked trustee to become a
 petitioning creditor, under the insolvent act, without the
 assent of the *cestui que trust*. That it was against the

[1] See *March v. Davison*, 9 Paige's Rep. 580.

spirit of the statute, to permit those who had no personal interest in the question, to decide whether the insolvent ought to be discharged from his liability to others. That it was at least doubtful whether the trustees could become petitioning creditors, even with the sanction of the court; and that the application must therefore be refused. But as it appeared that the insolvent was wholly destitute of property, the chancellor authorized the trustees, in their discretion, to discharge the debt due from him to the company; so that he might obtain a discharge on the petition of the requisite proportion of his other creditors.

1831.

Gilbert

v.

Gilbert.

D. GILBERT v. B. & B. F. GILBERT.

Where the complainant has actually removed from the state with his family, and changed his residence, the defendant is entitled to security for costs, although there is a probability that the complainant may return at some future day.

This was an application for security for costs. The facts March 15th are stated in the opinion of the court.

S. Kendrick, for the complainant.

S. G. Huntington, for the defendants.

THE CHANCELLOR. This is an application for security for costs. The affidavit on the part of the defendants is positive that the complainant is insolvent, and has removed from the state with his family. On the other side, the solicitor swears he is confident that the complainant intends to return to the state, and that his absence is temporary. He has, for the present, changed his actual residence; and, as it is evident, from the bill itself, that the suit is carried on for the benefit of his creditors, there

1831. Stewart
v.
Ellice. is no reason why they should *be permitted to carry on this suit in the name of a man who is, for the time at least, a non-resident and an insolvent, without security for costs. He must, within thirty days, give security by a bond, in the penalty of \$250, with two sufficient sureties, to be approved of by the register and filed in his office; and in default thereof, the bill must be dismissed, with costs. In the mean time, all proceedings on the part of the complainant must be stayed. (1 Sim. & Stu R. 348. 1 Paige's R. 644. 4 Dow. & Ry. R. 81.)

STEWART AND OTHERS v. ELLICE.

In the absence of any agreement on the subject, a debt is payable at the place where it was contracted, and where the creditor resides; and interest is to be computed according to the rate allowed by the laws in force at that place.

The court will not hear a cause, merely to decide a claim for costs, although the parties have compromised the suit, reserving the question of costs for the decision of the court.

April 5th. THIS was a case agreed upon between the parties; and the only questions submitted to the court, were as to the mode of computing interest on a debt acknowledged to be due from the defendant, who resides in England, and as to the costs of a former suit. The defendant insisted that he was only liable for interest according to the laws of England, and not for the interest allowed by the laws of this state, where his agent resided, and expended the money for his use, on property lying here.

D. Burwell, for the complainants.

A. Van Vechten, for the defendant.

THE CHANCELLOR. On an examination of the papers

submitted to me in this cause, I see no sufficient evidence of an agreement or understanding between the parties that the interest should not be computed in the usual manner, or that it should be paid in England. On general principles, in the absence of any agreement on the subject, the money is payable where the creditor resides, and the interest is to be computed *at the rate allowed by the law of the country where the contract was made, or is to be performed. The complainants appear to have computed it in conformity to the rules of law. It is impossible to decide whether Ellice or Girvan ought to pay the costs of the former suit, without going into a full hearing of the merits of that case. This has been rendered impossible, by the compromise between the parties. The rule of the court is, that if a suit is compromised or settled, without any agreement as to costs, each party must bear his own. And if the parties settle the cause between themselves, reserving the question of costs, the court will not hear the cause on a question of costs merely. (*Gibson v. Lord Cranley*, Mad. & Geld. R. 365. *Roberts v. Roberts*, 1 Sim. & Stu. 39. *Eastburn v. Downes*, 2 John. Ch. R. 317.)

1831.
Chalabre
v.
Cortelyou.

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CHALABRE v. CORTELYOU AND OTHERS.

Where a devisee of an insolvent had a mortgage which was a prior lien on the premises devised, and she entered upon the premises as devisee, and received the rents and profits thereof, *held*, that as between her and the creditors of the testator, she was bound to account for the rents and profits, and to allow them in part payment of the mortgage.

THE bill in this case was filed by a bond creditor of Daniel Cortelyou, deceased, against his devisees, to obtain satisfaction of the debt due to the complainant. A house and ten acres of land were devised to the defendant, Martha Cortelyou, who previously held a mortgage

September 7
1830.

1831. upon the same premises, to secure a debt from the testator.
 Mitchell Immediately after the death of the testator, she entered
 v. into the devised premises, and had received the rents and
 Bunch. profits thereof for several years. She now claimed the
 whole principal and interest due on her bond and mort-
 gage, without any deduction.

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THE CHANCELLOR decided, that as between the devisee and the creditors of the testator, she was bound to account for the rents and profits of the devised premises, or to allow them as part payment in ascertaining the amount due on her bond and mortgage. And it being admitted that those rents and *profits were equal to the interest which had accrued on her mortgage in the mean time, she was only permitted to retain the amount of the principal, out of the proceeds of a sale of the mortgaged premises.

MITCHELL v. BUNCH.

Whether the court of chancery has power to direct the application of real property, situated without the jurisdiction of the court, in payment of a judgment recovered in one of the courts of this state? Quære.

The court, however, has jurisdiction to compel a debtor, who has been discharged from imprisonment for debt, to discover his property, in order that it may be applied in satisfaction of his debts.

But, in England, where the creditor can, by an incarceration of the debtor, compel him to apply his property in payment of his debts, the court of chancery will not interfere.

If the person of the defendant is within its jurisdiction, the court has jurisdiction as to his property situated without such jurisdiction.

And that jurisdiction is exercised by compelling the defendant, either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or assignment thereof, as will be sufficient to vest in the grantee or assignee the legal title, as well as the possession of the property, according to the laws of the place where the same is situated.

The court of chancery has jurisdiction to enforce the performance of an

tracts made in a foreign country; not only where the party proceeded against is domiciled here, but also where he is a foreigner, if he be within the jurisdiction of the court at the time of the service of process upon him.

1831.

Mitchell
v.
Bunch.

A writ of ne exeat, although originally a prerogative writ, is now resorted to merely for the purpose of obtaining equitable bail.

Whenever the defendant intends leaving the state, the complainant, upon producing evidence of such intention, and of his equitable claims against the defendant, has a right to this equitable bail.

It is a matter of course to discharge a ne exeat, upon the party's giving security to answer the complainant's bill, where a discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself amenable to the process of the court which may be issued to enforce its performance.

As a general rule, a ne exeat is allowed only upon an equitable demand.

But in case of a bill filed for an account, it may be granted, although the defendant might have been arrested at law, this being a case where the courts of chancery and law have a concurrent jurisdiction.

A ne exeat may be granted in a suit between foreigners, and in respect to demands arising abroad.

The mere pendency of a suit in a foreign court, or in a court of the United States, cannot be pleaded in abatement, or in bar to a suit for the same cause, in a state court.

*But where a judgment debtor has been sued upon the judgment, in the circuit court of the United States, sitting within the state, and held to bail in such suit, and a bill has also been filed against him in the court of chancery, to obtain payment of the same judgment, and a ne exeat issued thereon against him, the ne exeat will be discharged, unless the complainant elects to release the defendant from his arrest and bail in the circuit court of the United States.

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This was an application to discharge a ne exeat. The October 4th complainant is a resident at the Havana; and the defendant resides at Carthagena, and is a citizen of the Colombian government. In April, 1821, the defendant being in New York, obtained his discharge under the act for the relief of debtors, with respect to the imprisonment of their persons. He was afterwards sued in the supreme court, by the present complainant, and plead that discharge in bar of execution against his person. In January, 1822, judgment was rendered against the defendant in that suit for \$42,381; exempting, however, his body from imprisonment thereon, according to the provisions of the

1831. *statute* The complainant caused an execution to be
 Mitchell issued on his judgment, and the same was returned by
 v. the sheriff unsatisfied, for want of any visible property
 Bunch. of the defendant whereon to levy. In August, 1831, the
 bill in this cause was filed, alleging, among other things,
 that for several years past the defendant had been en-
 gaged in mercantile business at Carthagena, and had
 sufficient property, either there or elsewhere, to satisfy
 the whole amount of the complainant's judgment; that
 a war existed between Spain and Colombia, so that the
 complainant, who was domiciled within a Spanish terri-
 tory, could not prosecute in the courts of Colombia, to
 recover the amount of his judgment; that the defendant
 was able, by means of bills drawn on his house in Car-
 thagena or otherwise, to raise the money and pay the
 complainant, but that he refused to do so; and that the
 defendant was temporarily within this state, but was
 about to leave the same for Carthagena. The bill, there-
 fore, prayed a discovery, and for satisfaction of the
 judgment, out of the property, choses in action, and
 equitable interests of the defendant, and for general relief.
 The complainant, by his bill, also prayed for a writ of ne
 [*698] exeat republica, to restrain the defendant from leaving
 the state until such discovery and relief could be ob-
 tained. A ne exeat was accordingly allowed by the
 injunction master, and was marked for bail in the sum
 of \$80,000. An affidavit of the defendant was read on
 this application, showing that the complainant had also
 caused him to be arrested in the circuit court of the
 United States, and to be holden to bail there, in an action
 of debt on the same judgment; and which suit was still
 pending.

D. B. Ogden, for the defendant. The parties to this
 suit are foreigners, and the debt, for the recovery of
 which the bill in this cause was filed, was contracted in
 a foreign country. And the defendant has no property

within the jurisdiction of the court. The bill prays that the defendant be required to bring his property within the jurisdiction of the court, and that the same be applied to the satisfaction of the complainant's debt. A ne exeat is a harsh proceeding; it is a dreadful weapon; and may be oppressively used to gratify malice. Lord Chancellor Eldon said: "It was a most powerful instrument, and he never applied it without apprehension." It can never be necessary except in extraordinary cases. (*Hannah v. McIntire*, 11 Ves. 55. *Dick v. Swinton*, 1 Ves. & B. 372.) Originally, in England, this was a prerogative writ, and was only issued to prevent citizens from leaving the kingdom. It never was supposed to apply to foreigners who were temporarily within the kingdom. (*Whitehead v. Murat*, Bunb. Exch. R. 183.) In one case, where the debt was contracted in England, the defendant was held to bail until his answer was put in, upon the ground of contempt. In *De Carriere v. De Calone*, (4 Ves. 590,) it was held, that an application for ne exeat was to the discretion of the court; that it was a matter of great delicacy to use it against a foreigner; and that it was granted only in case of a mere equitable demand, and never upon a mere legal demand, upon which the debtor might be held to bail at law. (*Robertson v. Wilkie*, Ambler's R. 177. *Pearne v. Lisle*, id. 76. *Anonymous*, 2 Atk. 210. *Jones v. Sampson*, 8 Ves. 573.) In *Porter v. Spencer*, (2 John. Ch. R. 269,) a ne exeat was granted to prevent a failure of *justice, as both the defendants and his bail were about to leave the state. In *Woodward v. Schatzell et al.*, (3 John. Ch. R. 412,) the complainant was a citizen, and the debt a partnership debt; but the ne exeat applied for was refused by Chancellor Kent. A foreigner cannot come here and claim the benefit of an extraordinary remedy, which is in some cases afforded to our own citizens. This is not a new principle. A non-resident creditor had no right to an attachment, under the old act for relief against absconding

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v.
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1831. or concealed debtors. (*In the matter of Fitzgerald*, 2
 Mitchell Caine's R. 318.) And by the revised statutes non-resi-
 v. dent creditors can only sue out an attachment in cases
 Punch. where the debt was contracted within the state. (2 R. S.
 3.) In 3 Caine's R. 318, it was held that foreigners were
 not entitled to an attachment under the act in relation to
 absconding or concealed debtors. By our statutes a dif-
 ference was intended to be made between foreigners and
 citizens. The acts of congress do not give the United
 States courts jurisdiction of suits between two foreigners.
 In this case both parties are foreigners. A ca. sa. is the
 highest remedy known to the law. In this court it must
 be considered as a process to compel the debtor to pro-
 duce his property, in satisfaction of his debt. This per-
 haps may be done in chancery, where the defendant can-
 not be held to bail at law, and his property is within the
 jurisdiction of the court. The statute authorizing cred-
 itor's bills was never intended to reach property out of
 the jurisdiction of the court. No process of the court
 could take such property. No officer could sell it. Where
 the debtor fraudulently sends his property out of the juris-
 diction of the court, the court might compel an assign-
 ment of it, by attachment or otherwise. Here there is
 no allegation in the bill that the property ever was with-
 in the jurisdiction of the court. The defendant being a
 foreigner, the decree can have no effect upon his property
 out of the jurisdiction of the court. An assignment
 made under an insolvent or bankrupt law in the United
 States, would not be sustained by the courts in a foreign
 country against subsequent assignees. (2 Kent's Com.
 420. *Ingraham v. Geyer*, 13 Mass. R. 146, per Ch. J.
 Parker.) This principle has also been recognized and
 established by the supreme court of the *United States.
 The cases which arise under the bankrupt laws of Eng-
 land have no application to this case. A commission of
 bankruptcy is only taken out in England where the bank-
 ruptcy was committed there. Assignments under our in-

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solvent laws are not binding in foreign countries, upon the ground that they are not voluntary assignments. The courts of Colombia would not allow the complainant to do indirectly what they will not permit to be done directly. The judgment recovered for this demand, being in a court of competent jurisdiction, is a bar to this suit. The complainant, by taking his judgment against property only, can only claim, in our courts, the future acquisitions of the defendant in the state. And in enforcing the remedies the contract, notwithstanding the judgment recovered upon it, must be construed according to the laws of Havana. And here the complainant is proceeding in two courts against the defendant for the same demand. The court will compel him to elect to proceed either at law or in equity. Courts in one state do not hold to bail for a debt, until a suit commenced for the same demand in another state, in which the party has been also held to bail, has been discontinued.

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B. F. Butler, for the complainant. If this ne exeat is not sustained the complainant will be remediless. The remarks of Lord Eldon have been referred to, to show his opinion of this writ. I refer to the case of *Howden v. Rogers*, (1 Ves. & B. 132,) also to show his views in relation to it. In that case, he said that "because this was an extraordinary writ, he never allowed it without reading the affidavit upon which it was applied for." This writ is no longer considered as extraordinary; it has come to be regarded as a part of the ordinary process of the court of chancery, adopted to enforce equitable bail and advance justice. It is nothing more than an equitable *capias*. The rules regulate the proceedings upon it. (*Gilbert v. Coit*, 1 Hopk. R. 499.)

The bill in this case is a creditor's bill, filed under the revised statutes, which were passed in affirmance of the doctrine laid down in the case of *Hadden v. Spader*, (20 John. R. 554,) and other cases. It is not necessary, in

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these cases, *that the defendant should have property within the jurisdiction of the court, in order to give the court jurisdiction. But the bill states that the defendant has, for several years past, remitted property to this country. It does not allege that he owns any property situated without the state, and it is so framed as to compel the discovery of all his property, wherever situated ; and the court is authorized to prevent its assignment, and to decree the satisfaction of the complainant's debt out of it, whether it be situated out of the state or not, and whether it was originally liable upon execution at law or not. If the debtor is within its jurisdiction, the court can compel him to apply his property, which is without such jurisdiction, in satisfaction of his debts. Personal property follows the person. An assignment, under the insolvent and bankrupt laws, transfers the right to it, wherever it may be. The court can even compel the debtor to convey his title to lands situated out of the jurisdiction of the court, if the creditor is willing to take them in payment of his debt. In a great variety of cases, the court of chancery, where the party is before the court, has exercised jurisdiction over real estate, situated without the jurisdiction of the court. (*Arglasse v. Muschamp*, 1 Vern. R. 75. *Earl of Kildare v. Eustace and others*, 1 Eq. Cas. Ab. 134, pl. 4. *Nabob of Arcott v. East India Co.*, 1 Ves. jun. 385. *Penn v. Lord Baltimore*, 1 Ves. sen. 445. *Lord Cranston v. Johnston*, 3 Ves. jun. 170. *Massie v. Watts*, 6 Cranch, 158, per Ch. J. Marshall. *Dunn and wife v. McMillen*, 1 Bibb's R. 409. *Telfair v. Telfair*, 2 Desaussure's Ch. R. 271. *Ward v. Arredondo*, 1 Hopk. R. 213. *Mitchell v. Smith*, 1 Paige's R. 287.)

Personal property follows the person of the owner. The *lex loci* controls it only in the place where the owner dies. The power of the court, however, over personal property, is co-extensive with its power over the person of the owner; and as the owner can here dispose of his

personal property, situated out of the jurisdiction of the court, the court will compel him to do it in favor of creditors.

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This court has embraced this case by its rules for the appointment of receivers. A receiver is invested with the debtor's whole estate. He is authorized to dispose of the *same, including any surplus which may belong to the debtor in a partnership concern. The chancellor can reach all a debtor's interest in a partnership; and the interest of an absent debtor may be attached. (2 Kent's Com. 344, 5, 6.) In the case of *Abraham v. Plestoro*, (3 Wend. R. 538,) it was conceded that a person could dispose of his personal property, wherever the same might be situated. As between persons residing in the state, there is no doubt of the jurisdiction of the court, to make a valid decree as to property in a foreign country. In that part of the revised statutes which relates to creditors' bills, there is no exception of the case of a non-resident defendant. It is, therefore, sufficient to show a strict compliance with the provisions of the statute. As a general principle, our courts are open to all alien friends. The remedy is always governed by the *lex fori*; so much so that a discharge, obtained under an insolvent act of the state or country where the contract was made, cannot be pleaded in another state or country. At all events, the parties to this suit have been before the courts of this country. A judgment has been obtained here, upon which an execution might be issued against the defendant. This has disposed of the objection, if any existed, to the parties being entitled to all the remedies of citizens. None of the cases cited by the defendant establish the position that the writ of ne exeat cannot be applied as to foreigners, temporarily in the country. The case cited from 3 John. Ch. R. 412, is an authority for the complainant. There, Chancellor Kent held that this writ might be used as between foreigners. In *Roddam v. Hetherington*, (5 Ves. R. 9,) where the defendant resided in the West Indies, the ne exeat

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was discharged on the coming in of the answer, but the defendant was ordered to give security, to abide the decree. The same order was made in the case of *Howden v. Rogers*, (1 Ves. & Bea. 129,) where the defendant lived in Ireland. In *Flack v. Holm*, (1 Jac. & Walk. 406,) where a ne exeat was granted, the defendant was a foreigner. In *Grant v. Grant*, (3 Russ. Ch. R. 598,) a ne exeat was granted, as between foreigners, who, in their own country, would not have been liable to arrest. These authorities show that the fact of the contract's having been *made in a foreign country, has no influence upon the question now under discussion. The defendant cannot rely upon his affidavit, as it is responsive to the bill which he should have answered. In the face of the record of the judgment for this debt in our court, it cannot be said that this debt was contracted in reference to the laws of a foreign country.

Ne exeats are always granted in cases of equitable demands; and also in many cases where courts of law have concurrent jurisdiction with equity. But here this court has exclusive jurisdiction; as all hopes of recovery depend upon the defendant's remaining here, and making discovery of his property. If the defendant admits he has property out of the state, but none in it, the reason becomes stronger for retaining the ne exeat to enforce a transfer of such property in discharge of this debt. We have a right, at all events, to keep the defendant here until he puts in his answer; and if he has property out of the state, until the decree. Even where a debtor has been held to bail at law, to prevent a failure of justice a ne exeat will be granted. But this is a case of mere equitable cognizance; our object is to compel the defendant to discover the property he has acquired since his discharge, and to have it applied in satisfaction of the complainant's debt. The remedy of the statute is against the future acquisition of the party, and we cannot avail ourselves of this remedy except by a discovery. And the creditor is compelled to come into chancery, in order to reach the new acquisitions

of the debtor, they generally being choses in action, or property which cannot be touched at law. The case of *Ashworth v. Wrigley* (1 Paige's R. 301) is not applicable. There no fraud was charged; we show a case of equitable fraud. Unless this ne exeat is sustained, there will be an entire failure of justice. (1 Eq. Ca. Abr. 133.) In *Boehm v. Wood*, (Turn. & Russ. Ch. R. 332, 343, 344,) it was held that a ne exeat would be sustained, where it clearly appears that a specific performance will be decreed. Our case is stronger than this; we have an equitable demand, and are entitled to a decree for the same. Lord Eldon's views as expressed in this last case, appear to have changed. He at that time could approach this writ without dread. A ne exeat is granted on a bill for an account. This case is an exception to the rule that the demand must be equitable to authorize a ne exeat. In *Dunham v. Jackson*, (1 Paige, 629,) a ne exeat was granted. Also in *Denton v. Denton*, (1 John. Ch. R. 364, 441.)

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The notice of the defendant does not authorize him to call upon us to elect in which court to proceed. It appears the proceedings at law were first instituted. Suppose we should show that these proceedings were ineffectual; would the chancellor, in that case, compel us to elect? In *Thompson v. Graham*, (1 Paige, 452,) the chancellor says: "If the complainant proceeds at law it will then be in time to compel him to elect." The proceedings in the circuit court of the United States cannot be noticed by this court, as the courts of the United States are considered as foreign tribunals, although sitting within the state. (*Walsh v. Durkin*, 12 John. R. 99. *Baldwin v. Hale*, 17 John. R. 272.) A party cannot plead the pendency of a suit for the same cause of action in the courts of a sister state. (*Bowne v. Joy*, 9 John. R. 221. *Lord Dillon v. Abares*, 14 Ves. R. 357. 2 Mad. Ch. Pr. 315. Mitf. Pl. 204.)

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inquire, whether under the 39th section of the title of the revised statutes which relates particularly to this court and its proceedings, (2 R. S. 174,) real property, out of the jurisdiction of the court, can be applied in satisfaction of the complainant's judgment. Independent of the statute, this is clearly a case in which the court has jurisdiction to compel a debtor, whose body is exempt from execution at law, to discover his property, so that it may be applied in satisfaction of his just debts. The case made by the complainant's bill, comes directly within the decision of Lord Hardwicke, in *Edgell v. Haywood & Dawe*, (3 Atk. 352,) which decision I believe has never been questioned even in England; although the court of chancery there will not interfere in cases provided for by the bankrupt act, or where the plaintiff can by a real incarceration of the debtor compel him to apply all his property in payment of his honest debts. In that case, as in this, the defendant's body could not be taken in execution; and *the judgment was entered to be levied of his property only. Whether the defendant has any part of his property vested in lands, and whether it is of that kind of property which can be reached by an execution at law, cannot be ascertained until the coming in of the answer. It will then be in time to raise the objection that this court cannot make a decree concerning real estate which is situated in a foreign country.

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The original and primary jurisdiction of this court was in personam merely. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties, to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the

person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court; or to execute such a conveyance or transfer thereof, as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*. Thus in *Penn v. Lord Baltimore*, (1 Ves. sen. 444,) Lord Hardwicke decreed the specific performance of a contract relative to the boundary between the colonies of Pennsylvania and Maryland. So in *Archer v. Preston*, cited by Lord Nottingham, and by Lord Keeper Guilford, in the case of *The Earl of Arglasse v. Muschamp*, (1 Vern. R. 77, 135,) the court decreed the specific performance of a contract respecting lands in Ireland; the defendant being temporarily within the jurisdiction of the court. In *Farley v. Shippen*, (Wythe's R. 135,) the court of chancery of Virginia decided that it had jurisdiction to decree a conveyance of lands lying in an adjoining state. That, although it could not award a sequestration against those lands in execution of the decree, it might award an attachment against the person of the defendant for a *contempt in refusing to perform the decree. (See also *Toller v. Carteret*, 3 Vern. R. 494; *Hughes v. Hall*, 5 Munf. R. 431; *Cranstown v. Johnson*, 3 Ves. 170; 5 id. 277, S. C.; *Earl of Kildare v. Eustace*, 1 Vern. R. 419; *Earl of Derby v. Duke of Athol*, 1 Ves. sen. 203; *Guerrant v. Fowler & Harris*, 1 Hen. & Munf. R. 5; *Messie v. Watts*, 6 Cranch, 148; and *Ward v. Arredondo*, 1 Hopk. 213.)

Although the question, how far the courts of our country are authorized to proceed against foreigners temporarily within their jurisdiction, in relation to contracts made in another country, has been frequently raised, it appears now to be well settled, both in this state and in England, that they have jurisdiction to enforce the performance of such contracts, where the party proceeded against :

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within the jurisdiction of the court. And it makes no difference whether the defendant is actually domiciled here, or is temporarily within the jurisdiction at the time of the service of the process to appear and answer the plaintiff's demand. (*Sicard v. Whale*, 11 John. R. 194. *Peck v. Hozier & Mulock*, 14 id. 346. *Smith v. Spinolla*, 2 id. 198. *Imlay v. Ellefsen*, 2 East's R. 453.) Neither is this practice of entertaining suits against, or between foreigners, of recent origin, or confined to the courts of this country and of England. By referring to the Digest, it will be found that the courts of Rome not only took cognizance of suits between foreigners, but that a judge was specially authorized to discharge that duty. The office of *Prætor Peregrinus* was created for the express purpose of administering justice between foreigners, or strangers, who resorted in great numbers to the imperial city; and perhaps also between strangers and citizens. (Digest, lib. 1, tit. 2, fr. 2, § 28.) And a similar office, and with substantially the same powers, is said to have existed among the Athenians. (Taylor's Civil Law, 211.) By the law of Holland, also, the person of a foreigner may be arrested, either *in securitatem debiti*, or for the purpose of giving jurisdiction to a tribunal which is not the natural judge of the party, because he is not domiciled within its jurisdiction. (Van Der Linden's Inst. 430.) The *meditatione fugæ* warrant of Scotland is also used, as well for the purpose of securing the persons of *strangers, temporarily within the country, as to obtain security from those who intend to leave Scotland for the purpose of eluding the process of the court. (1 Bell's Dict. tit. Arrestment. 2 id. tit. Meditatio fugæ. Ersk. Princ. 17.) By the French code, foreigners, not resident in France, may be cited before the tribunals of that country to enforce the execution of contracts entered into with Frenchmen, either in France or elsewhere. (Code Nap. lib. 1, tit. 1, ch. 1.) And they may also be arrested on commercial contracts. In most of the countries, how

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where the civil law prevails, it does not appear to be fully settled whether their courts can arrest a foreigner, who is only temporarily within the jurisdiction, at the writ of another foreigner, who is also a non-resident, on a commercial contract made abroad. (See *Janet v. Maidmont*, and *Scott v. Carmichael*, 2 Bell's Com. 564.)

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In this court the writ of ne exeat is simply a means of obtaining equitable bail; and however liable it may be to abuse, when used politically as it formerly was in England, it is as harmless here as the ordinary process of the courts of common law, usually denominated bailable writs.[1] Although in form it prohibits the defendant

[1] A ne exeat is in the nature of equitable bail, and may be applied for at any stage of the suit. *Dunham v. Jackson*, 1 Paige, 629. A writ of ne exeat, although originally a prerogative writ, is now resorted to merely for the purpose of obtaining equitable bail. *Mitchell v. Bunch*, 2 Paige, 606. Whenever the defendant intends leaving the state, the complainant, upon producing evidence of such intention, and of his equitable claims against the defendant, has a right to this equitable bail. 1b. The district judges of the courts of the United States have no authority to issue writs of ne exeat. *Gernon v. Boccaline*, 2 Wash. C. C. 180. The object and design of the writ of ne exeat regno, as used by courts of chancery, is to hold the party amenable to justice, and to render him personally responsible for the performance of their orders and decrees. *Johnson v. Clendenin*, 5 Gill & Johna. 463. A bill quia timet, upon a contract for personal services to be performed at a certain time, cannot be filed for the purpose of obtaining equitable bail, although there is danger that the defendant may leave the state before the time for the performance of the contract arrives. *De Rivaipnolli v. Corsetti*, 4 Paige, 264. A writ of ne exeat cannot be granted unless, 1. There is a precise amount of debt positively due; 2. It must be an equitable demand on which the plaintiff cannot sue at law, except in cases of account, and a few others of concurrent jurisdiction; 3. The defendant must be about to quit the country, proved by affidavits as positive as those required to hold to bail at law. *Rhodes v. Cousins*, 6 Randolph, 188. It appears in the state of Alabama, writs of ne exeat may be properly granted in the following cases: 1. Where the demand is exclusively equitable, whether a sum certain be due or not, and the defendant is about to remove beyond the jurisdiction of the court; 2. Where the courts of law and equity have concurrent jurisdiction, the defendant being about to remove, and where bail has not been obtained, it will be granted in aid of the action at law; 3. Where the two courts have concurrent jurisdiction, and no action at law has been commenced,

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 Mitchell matter of course to discharge the writ, upon the party's
 v. giving security to answer the complainant's bill, where a
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but a suit in equity instituted, the removal of the defendant will be restricted; 4. In cases of extreme necessity, and where it becomes necessary to prevent a failure of justice. But, as to the last, *quære*? *Lucas v. Hickman*, 2 Stewart, 11. If the party against whom a final decree is made intends to remove beyond the jurisdiction of the court, before the decree can be enforced by execution, a *ne exeat* will be granted. *Dunham v. Jackson*, 1 Paige, 629. As a general rule, a *ne exeat* is allowed only upon an equitable demand. But, in case of a bill filed for an account, it may be granted, although the defendant might have been arrested at law; this being a case where the courts of chancery and law have a concurrent jurisdiction. *Mitchell v. Bunch*, 2 Paige, 606. A *ne exeat* may be granted in a suit between foreigners, and in respect to demands arising abroad. *Ib.* A writ of *ne exeat* cannot be granted for a debt founded on a promissory note not due. It can only issue where the demand is an equitable one. *Cox's ex'rs v. Scott*, 5 Har. & Johns. 384. The form of a bond to be executed by the defendant, on a writ of *ne exeat* being served on him. *Ib.* Under the same bill, a *ne exeat*, as well as an injunction, may be granted. *Byron v. Petty*, 1 Bland, 182. A writ of *ne exeat* cannot be granted for a debt due and recoverable at law. It is applicable only to equitable demands in the nature of debts actually due. *Seymour v. Harvard*, 1 John. Ch. Rep. 1. Where a wife had filed a bill for alimony, &c., against her husband, and it appeared that he had abandoned her, without any support, and threatened to leave the state, the court, on the petition of the wife, granted a writ of *ne exeat* *republica* against the husband. *Denton v. Denton*, 1 Johns. Ch. Rep. 264. The act to abolish imprisonment for debt has not deprived the court of chancery of the power to issue a writ of *ne exeat*, in cases of equitable cognizance, where such writ would have been allowed previous to the passage of that act. But a *ne exeat* will not be granted upon a mere legal demand, upon which the complainant would not have been entitled to equitable bail in this court, before the passing of that act, although the defendant is about to remove from the state. *Brown v. Haff*, 5 Paige, 235. A suit in chancery, by a judgment and execution creditor, to reach equitable interests, things in action and effects, is an equitable and not a legal demand; and the defendant may be arrested on a *ne exeat* therein. *Ellingwood v. Stevenson*, 4 Sandf. Ch. Rep. 366. A writ of *ne exeat* will not issue unless there is a debt due from the defendant to the complainant, or unless the complainant is entitled to an account. *Williams v. Williams*, 2 Green's Ch. Rep. 130. The rule that courts of equity interfere by *ne exeat* only in case of equitable demands, applies where money, not property, is the subject of controversy. *Edwards v. Massey*, 1 Hawks, 359. The writ of *ne exeat* is not here a pre-

discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself amenable to the process of the court, which may be issued

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rogative writ; in a proper case, this writ is of right, and not discretionary. *Gibert v. Colt*, Hopkins, 496. Citizens of other states, and foreigners, are liable to a writ of ne exeat, while in the state of New York. The court determines the amount in which the defendants shall be held to bail; and the sheriff must take the bond in the amount directed as the penal sum. *Ib.* The sheriff is answerable for the sufficiency of the securities which he takes upon a writ of ne exeat. But where he has taken bail upon the writ, if the defendant leaves the state the court will allow the sheriff a reasonable time to produce the defendant; or in case he cannot be produced, will allow a reasonable time to the sheriff to prosecute the bond, and to recover the amount, which the sheriff is ordered to pay. *Brayton v. Smith*, 6 Paige, 489. A surety may proceed against his principal by ne exeat before he pays the debt; but the object of the act of 1828, giving the surety this process, is only to prevent the removal of the property or person of the principal out of the state; and in case the surety pays the debt, or suffers by his liability, and shows that new fact by an amended bill, a decree will be made for his indemnity; but without such payment the court cannot decree against the principal in personam for the debt. *Buford v. Francisco*, 3 Dana, 68. Where a bill is merely to prevent the removal of chattels, and the defendant has given bond and security to surrender them as the decree may require, it is erroneous to decree a sale of the chattels; if it appear by the pleadings that the surety has paid the debt, or that there is judgment against him for it, he may have a decree against the principal in personam for the amount, or for a surrender of the chattels to be levied on; without such allegation there can be no decree. *Ib.* 69. On a bill to account against persons resident in another state, with an affidavit of a certain amount due, duplicate writs of ne exeat were ordered to several counties, in one or other of which the defendant was expected to be found. *Sloss v. McIlvaine*, 2 Bland's Ch. Rep. 72. The form of a bond to be executed by the defendant on a writ of ne exeat being served on him, set out. *Cox's heirs v. Scott*, 5 Har. & Johns 384. The court determines the amount in which the defendant shall be held to bail; and the sheriff must take a bond in the amount directed as the penal sum. *Gibert v. Colt*, 1 Hopkins, 496. The object and design of the writ of ne exeat regno, as used by the court of chancery, is to hold the party amenable to justice, and to render him responsible for the performance of their orders and decrees. *Johnson v. Clendenin*, 5 Gill & Johns 463. The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at common law: they undertake that the defendant shall be responsible for the performance of the orders and decrees of the court. *Ib.*

1831. to enforce the performance of the decree. *Woodward v. Schatzell*, 3 John. Ch. R. 412. *Gibert v. Colt*, 1 Hopk. R. 496. *Russell v. Asby*, 5 Ves. 96. *Atkinson v. Leonard*, 8 Bro. C. C. 218. Chitty on Prerog. 23.) If this court has jurisdiction of the cause, and the defendant intends to leave the state, so that the decree against him would necessarily prove ineffectual, the complainant has a right to this equitable bail, on producing proper evidence of that fact and of the actual existence of the equitable claim for which the suit is instituted.

[*618] In the English court of exchequer this writ is not used; but an order for security, in the nature of a ne exeat or of equitable bail, is obtained upon motion. (1 Fowler's Exc. *Prac. 36, 203.) The form of the order in that court appears to be, that the defendant, within one week after service of the order, enter into a recognizance with proper sureties, not to depart the kingdom without putting

Where the defendant, in a writ of ne exeat, has been proceeded against and committed to jail for not complying with a final decree of the court, in the cause, and afterward escapes from custody, his securities upon the ne exeat bond are not responsible, and the court, as respects them, may order the bond to be cancelled. 1b. Where L. had been arrested on a ne exeat, and had given the usual bail to the sheriff upon such arrest, and afterward on an agreement between him and the complainant, the ne exeat was discharged upon his executing the usual bond to answer the bill, and abide the decree; it was held, that as L. had not in his arrangement reserved his right of questioning the propriety of issuing the ne exeat, he was precluded from moving that the bond be given up and cancelled upon the ground that the ne exeat was improvidently issued. *Jessup v. Hill*, 7 Paige, 95. The giving the usual security to the sheriff upon the ne exeat, does not preclude the defendant from applying upon the bill only, or upon the coming in of the answer, to have the writ discharged, and the bond to the sheriff given up and cancelled. 1b. But where the defendant for his own convenience applies to the court and gives the usual bond without asking to reserve the right of applying to cancel the bond, the right to raise the question as to the propriety of holding him to bail originally will be deemed to have been waived. 1b. It is a matter of course to order the ne exeat to be discharged upon the defendant's giving security to answer the complainant's bill, and to render himself amenable to the process of the court, pending the litigation. *McNanara v. Dwyer*, 1 Paige, 239.

in his answer and performing such decree or order as the court may thereafter make in the suit. (*Attorney General v. Mucklow*, 1 Price's R. 289. *Davis v. Heron*, in 1753, id. 291, note.) In a cause before that court in 1724, such an order was made against a defendant, who resided at Oporto; although, in another case against the same defendant, who had answered, and, I presume, had denied the equity of the complainant's bill, the court refused the order. (*Whitehead v. Murat*, Bunb. R. 183.) The court of exchequer, in Ireland, have adopted the formal process of a ne exeat to obtain equitable bail. It issues under the exchequer seal, and is granted as a matter of course, when properly applied for, according to the 80th general rule of that court. (Howard's Eq. Side, 651, 2.)

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As a general rule, this process is only issued for an equitable demand, and cannot be allowed on a mere legal claim. But, where there is a concurrent jurisdiction between the court of chancery and courts of common law, as in the case of bills for an account, it may be granted, although the defendant could have been arrested by process issued out of a court of law. (1 P. Wms. 263, n. 1. *Russell v. Asby*, 5 Ves. 96. *Jones v. Sampson*, 8 id. 593. *Jones v. Alephsin*, 16 id. 470.)

In *Baker v. Dumaresque*, (2 Atk. 66,) Lord Hardwicke restrained a defendant from going out of the kingdom to the place of his abode, until he should give security to abide the decree. In *Archer v. Preston*, before cited, a ne exeat was granted against a defendant temporarily in England; and in *Atkinson v. Leonard*, the writ was granted in favor of an inhabitant of Antigua, against a resident of the same place, who merely came to England with his wife for medical advice. In *Howden v. Rogers*, (1 Ves. & Beam. 129,) it was allowed against a defendant domiciled in Ireland; and who only came to England, temporarily, on business. In the case of *Flack v. Holm & Ludert*, (1 Jac. & Walk. 406,) *Lord Eldon granted a ne exeat against a Russian, who resided at St. Petera-

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 mission merchant. And in the recent case of *Grant v.*
 Mitchell *v.* *Grant*, (3 Russ. R. 598,) the writ was allowed against a
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 between persons who were resident at that place; although,
 by the laws of Jamaica, the defendant could not have
 been arrested for such debt.

In the case of *De Carrier v. The Abbe De Callonne*, (4
 Ves. 578,) Lord Eldon discharged a *ne exeat*, granted by
 the master of the rolls, in favor of one French emigrant
 against another. But it was evidently on the ground that
 the debt was not due, according to the agreement and
 understanding of the parties, at the time the writ was
 allowed. In this court, in *Woodward v. Schatzell*, (3
 John. Ch. R. 412,) Chancellor Kent, after a full examina-
 tion of the cases, decided that the writ may be granted in
 the case of foreigners, and in respect to demands arising
 abroad. Chancellor Sanford came to the same conclusion
 in *Gibert v. Colt*, (1 Hopk. R. 496,) and granted a *ne*
exeat against a citizen of Maryland, who was temporarily
 in this state.

If the complainant is entitled to this writ against a
 foreigner who is merely here for a temporary purpose,
 this appears to be a proper case to retain the process
 against the defendant. It is not denied that the com-
 plainant has a just and equitable demand against him, to
 the extent of nearly \$80,000, including interest; and that
 the defendant has the means of paying the whole amount.
 But his property is in such a situation that the complain-
 ant cannot reach it, except by the aid of this court, and
 by detaining the defendant within its jurisdiction, to
 abide such order or decree as may be found necessary to
 compel him to apply his property in satisfaction of the
 complainant's claim. In the language of Senator Allen,
 in *Pettit v. Candler*, (3 Wend. R. 625,) "What can be
 more reasonable than that every man possessing the
 means should pay his honest debts; and if he possess the

means, and place them in a situation beyond the reach of legal process, is there any injustice in compelling him to render an account of the property thus fraudulently *concealed?" Although the principal part of the defendant's property is vested in a partnership with others, that does not discharge him from the moral obligation of applying it in satisfaction of the complainant's debt, after all just claims of his copartners and the creditors of the firm have been provided for. This court will not require of him an impossibility. But so far as he can control his interest in the partnership funds, consistently with the laws of the country in which those funds are now placed, and without prejudice to the rights of others, he may be required to apply his interest in that species of property in satisfaction of the complainant's debt.

The mere pendency of a suit in a foreign court, or in a court of the United States, cannot be pleaded in abatement, or in bar to a proceeding in a state court. If the complainant had proceeded to judgment there, it would indeed present a different question; as the original judgment in the supreme court of this state, which forms the foundation of the complainant's bill, would be merged in such new judgment. In *Maule v. Murray*, (7 T. R. 470,) the court of king's bench refused to discharge a defendant, who had already been arrested and held to bail, in this state, for the same demand. And in *Imlay v. Ellefsen*, (2 East, 453,) the same court refused to discharge a defendant, who had already been holden to bail, for the same cause of action, in a suit in Norway. But, I apprehend, the principles of these decisions can hardly be extended to the circuit court of the United States, sitting within the limits of our own state. This court will judicially notice the fact, that the arrest of the body of the defendant on mesne process in that court, is for the purpose of compelling him to pay the debt or to render himself in execution in satisfaction thereof; and that the proceeding in that court, in an action of debt on the judgment

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by which it will be finally merged in the new judgment to be obtained there, is wholly inconsistent with the proceeding by bill in this court to aid execution of the judgment of the supreme court.

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It certainly cannot be necessary for the protection of this complainant's rights, that the defendant should be compelled to give security in two different suits pending at the same time, in different courts, and for the recovery of the same *debt. The ne exeat must therefore be discharged, unless the complainant, within ten days after notice of this order, consents to release the defendant from his arrest in the circuit court, upon his entering an appearance or filing common bail in that suit. It is not necessary at this time to decide, whether this is a case in which the complainant may be compelled to elect in which suit to proceed; as the notice is not properly framed to compel an election between this suit and that in the circuit court. But this court may excuse the defendant from giving bail in both suits, when one is sufficient for all the purposes of justice. If the complainant consents to relinquish the bail in the circuit court, the defendant may still be discharged from the ne exeat here, upon his giving the usual security to appear and answer the complainant's bill, and to obey and abide such order and decree as may be made by this court in the premises. Such security to be approved of by the vice chancellor or injunction master of the first circuit; on notice to the complainant, so that he may be heard in relation to the sufficiency of the sureties offered.

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Upon a bill filed by the husband against the wife for a divorce, upon the ground of adultery, the husband, upon the application of the wife, will be ordered to pay her a gross sum to defray the expenses of her defence, and also a reasonable sum for alimony during the pendency of the litigation, although affidavits are presented on the part of the husband, showing the guilt of the wife.

But the application of the wife for an allowance, to enable her to make her defence, and for alimony, will not be granted, unless she denies, in her petition, on oath, the truth of the charge of adultery, or shows therein some valid defence to the husband's suit.

THESE were cross suits, brought by the husband and wife against each other, both claiming a dissolution of the marriage, on the ground of adultery. In the first suit, the wife put in an answer, without oath, denying the adultery charged against her in the bill, and making recriminatory allegations of adultery against her husband. She thereupon *presented petitions, in both suits, to the vice chancellor of the first circuit, before whom the suits were pending, stating therein, among other things, that she was left by her husband destitute of any means of support; also alleging her belief that the husband was worth from twenty to thirty thousand dollars; and praying for an allowance from him to defray the expense of prosecuting and defending the suits, and for her support in the mean time. In answer to this application, the husband put in his affidavit, denying the charges of adultery made on the part of the wife, and alleging his own insolvency. He also produced affidavits of a great number of persons, to prove the charge of adultery against the wife, and other misconduct on her part, and to show that she sustained the reputation of a common prostitute. The vice chancellor made an order, directing the husband to

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pay \$100 to the wife, or her solicitor, to enable her to defend and prosecute the suits; and referring it to a master, to examine and report what alimony, if any, should be allowed and paid to her during the pendency of the suits. From this order, the husband appealed to the chancellor.

H. S. Mackay, for the appellant.

J. Radcliffe, for the respondent.

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THE CHANCELLOR. The affidavits produced on the part of the husband, before the vice chancellor, presented a strong case against the wife; and if those affidavits are true, she has no claim or pretence to be furnished with money, from the husband's daily earnings, to carry on this litigation. But in the case of *L. Wood v. C. Wood*, (ante, 108,) this court held that the question as to the wife's guilt could not be decided upon conflicting affidavits, on an application like the present. The case of *Perkins v. Perkins*, decided in September, 1828, was disposed of on a different principle. It is true that in that case affidavits were produced on the part of the complainant, showing that the defendant was a common prostitute, and that she kept a house of ill fame, in the city of New York. The complainant, however, was an infant, without property, and the suit was prosecuted by his father, as his *next friend. The application, on the part of the defendant, was, that the next friend of the husband should furnish her with funds, out of his own property, to defend the suit. The court decided that the father could not be compelled to furnish her with the means of defence, and that he was not liable for alimony during the litigation. And upon the facts disclosed in that case, it appeared there were no reasonable grounds for staying the proceedings until the husband was of full age.

Upon the papers which were presented in this cause,

however, there was a defect, which, if the vice chancellor's attention had been called to it, he would undoubtedly have considered a sufficient ground for refusing the respondent's application. The defendant, to a bill for divorce, charging her with the crime of adultery, is not bound to put in her answer on oath, as she cannot be called upon to criminate herself. But this court has frequently decided, that if she applies for an allowance to enable her to defend the suit in such a case, she must, in her petition, deny the adultery charged in the complainant's bill, or show that she has some other valid defence to the suit. The first petition presented in the case of *Wood v. Wood*, above referred to, was dismissed, because the wife had not denied, on oath, the adultery charged against her in the bill. But on a suggestion that the allegation of her innocence had been left out of the petition through mere inadvertence on the part of her solicitor, she was permitted to renew the application. Although this court will not, on an application for an allowance to defend the suit, or for alimony, decide as to the guilt of the wife, if she denies the charge on oath, yet, if her guilt is open and notorious, as it is alleged to be in this case, she may be indicted and punished for the perjury if she swears to a petition which she knows to be false. If the recriminatory allegations in her answer and cross bill are true they furnish a good defence, although she might not be able to swear to her own innocence. But the cross bill is filed on her allegation of belief only; and the charges therein are fully denied, not only by the appellant's own oath, but also by the oaths of the persons with whom the offence of adultery is alleged to have been committed. If the wife, therefore, intended to rely on these recriminatory *allegations only, she should have procured the affidavits of the persons who gave her the information, and who knew the facts.

The order of the vice chancellor must be reversed, and the petitions be dismissed; but without prejudice to the

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1881. right of the respondent to renew her application to the
Osgood vice chancellor, upon a new petition, denying on oath the
v. adultery charged in the bill of the appellant. If, how-
Osgood. ever, as alleged by the husband, the wife has sufficient
property in her hands to defray the expenses of the suit
and to support herself pending the litigation, he should
not be called upon personally to advance anything more,
until that property is exhausted. And an order may be
made, authorizing such a disposition of the property as
will give a good title to the purchaser.

The proceedings in this case are to be remitted to the
vice chancellor.

GENERAL RULES.

SINCE the revision of the rules on the first of January, 1830, the following amendments and additional rules have been made and adopted :

RULE 32,

As amended April 5th, 1831.

If the vice chancellor or master, to whom application for an injunction is made, thinks the defendants or any of them should be heard on the question before the injunction is granted, he may refuse to allow the same ex parte, and instead thereof may direct an order to be entered, requiring the defendants to show cause before the court, on a regular motion day, or some day in term, why the injunction should not be granted. He may also direct on which of the defendants the bill and order to show cause shall be served, and the time and manner of such service.

And no order for an injunction to suspend the general and ordinary business of a bank, or other moneyed corporation, upon the bill or petition of any person, other than the attorney general or a bank commissioner, shall in any case be made by a vice chancellor, without due notice of the application to the proper officers of the corporation ; unless the complainant shall give to the corporation a bond, with two sufficient sureties, to be approved of by the vice chancellor, in the penalty of at least \$10,000, and conditioned to pay all damages which the corporation may sustain by reason of the injunction, if it shall afterwards appear to have been unnecessarily or improperly issued. Nor shall an ex parte order for the appointment

The injunction master may direct order to show cause.

No order for injunction to be made by a vice chancellor (except on application of attorney general or bank commissioner) without due notice and bond in the penalty of \$10,000.

GENERAL RULES.

of a receiver of the effects of the corporation be made by a vice chancellor upon any such bill or petition.

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*RULE 99,

As amended April 23d, 1830.

Reference of course, by whom executed. An order for a reference, when entered of course, shall be executed by a master residing in the same county with the solicitor who obtained the order, unless a different master is agreed upon by the parties; or if there is no master in the same county legally competent, the order may be executed by a master in an adjoining county.

Special order of reference, by whom executed. If the reference is by a special order or decree of the court, it may be made to any particular master by name, or to any master in a particular county or place, in the discretion of the court; and if no particular master, or county or place is named or specified in the order or decree, it shall be executed by an injunction master or a taxing master only, unless some other master is agreed upon by the parties.

Master to be designated in order of reference in certain cases. An order of reference, when obtained of course by a solicitor residing in the city of New York, shall specify the name of the master by whom the same is to be executed. If the parties to the reference, or their solicitors, do not agree upon a master to be designated in the order, the register, assistant register, or clerk, with whom the same is entered, shall select the name of one of the masters residing in that city, by lot, to be inserted therein; and if the master thus selected is absent from the city, or is interested in the object of the reference, or otherwise legally disqualified from executing the order, the name of another shall be selected in the same manner.

RULE 116,

As amended April 5th, 1831.

Security and deposit on appeals to the chancellor.

On appeals to the chancellor from decrees or orders of the vice chancellors, the bond or deposit as security for

costs, may be an amount of one hundred dollars only; and in all other respects, the provisions of section 80, and the nine succeeding sections of title 3d of chapter 9 of the 3d part of the revised statutes, with the necessary variations as to form merely, shall be applied to such appeals. And the bonds *required to be given on such appeals, or on appeals to the court for the correction of errors, may be approved of by any vice chancellor or injunction master, or by the register, assistant register, or clerk with whom the appeal is entered; to be signified by his approbation endorsed on such bonds.

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But no appeal from any interlocutory order or decree of a vice chancellor, before a final decree in the cause, shall operate as a stay of proceedings, unless a special order to that effect shall be made by the chancellor; unless the appellant, at the time of entering his appeal, shall, in addition to the deposit and security required in such cases, procure and file with the clerk, a certificate of the vice chancellor that there is probable cause for appealing; that the order or decree appealed from involves the merits of the cause, or some part thereof; and that it is reasonable and proper that the questions arising on such appeal should be decided by the chancellor before the final decree in the cause, and before any further proceedings are had on such interlocutory order or decree before the vice chancellor.

RULE 178,

As substituted April 23d, 1830, for the 178th rule, which was abrogated.

If the master decides that a sale of the premises, or any part thereof, is necessary, it shall be his duty also to ascertain and report whether any creditor, not a party to the suit, has a specific lien on the undivided share or interest of any of the parties therein, by mortgage, devise, or otherwise, and the name and residence of such cred-

Reference of course to as certain in cumbrances, if lands cannot be divided.

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itor, and the nature of such lien or incumbrance, so far as the same can be ascertained by him. And on the coming in and confirmation of the report, if it appears that a sale is necessary, and that all the proper parties are before the court, the complainant may have an order of course, referring it to a master to ascertain and report whether the undivided share or interest of any of the parties in the premises, is subject to any general lien or incumbrance, by judgment or decree, and to ascertain and report the amount due to any party to the suit, who has either a general or specific lien on the premises to be sold, or any *part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. The master, if requested by the parties who appear before him on such reference, shall also ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon, in the hands of the purchaser, to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof, on such sale.

RULE 179,

As amended April 5th, 1881.

Party entitled to life estate, may have annual income after deducting expenses, or the present value of a life annuity, at six per cent. at his election. Whenever a party, as tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum and receiving and paying over the interest or income thereof; but if such party is willing and consents to accept a gross sum, in lieu of such an-

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nual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables.

And where money belonging to an infant or an absentee, or to an unknown owner, is brought into court, for his benefit, under a final decree in partition, if no direction for the investment thereof is contained in the decree, and the money is not applied for within six months thereafter, it shall be the duty of the register, assistant register, or clerk, with whom the same is deposited, and without any special order for that purpose, to cause it to be invested in public stocks or other permanent securities, or in the New York Life Insurance *and Trust Company, to accumulate for the benefit of the party entitled thereto. He may also in like manner reinvest the income of such money from time to time, without any special order for that purpose, whenever, in his opinion, the amount of such income is sufficient to render an investment thereof proper and beneficial to the person interested therein.

Money belonging to an infant and unknown owner in certain cases to be invested.

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ADDITIONAL RULES ADOPTED MARCH 3d, 1830.

RULE 181.

When a final decree is entered in a cause, if all the pleadings and other papers, which by law are to be annexed to the enrolment thereof, are not in the office where the decree is entered, it shall be the duty of the party upon whose request the decree is enrolled, to apply at the proper office or offices, and have such pleadings and papers transmitted to the office of the register, assistant register, or clerk, where such decree is to be enrolled; it shall also be his duty to see that the necessary taxed bills of costs are furnished, to be annexed to the decree on enrolment.

Party applying for enrolment to see that papers and bills of costs are furnished.

GENERAL RULES.

RULE 182.

Officers to transmit papers for enrolment. The several officers with whom any such pleadings or papers are filed or deposited, on the application of a party, or his solicitor, or upon the written request of the register, assistant register, or clerk, with whom the final decree is entered, shall transmit all such pleadings and papers to the office where the decree is to be enrolled, at the expense of the party requesting such enrolment.

RULE 183.

Proceedings to compel parties to furnish taxed bills of costs. Where the final decree awards costs to any or all of the parties to be paid out of the proceeds of a sale, or otherwise, any party who wants an enrolment, may give notice to any other party entitled to costs under the decree, to file a taxed bill of such costs with the register, assistant register, *or clerk, with whom such decree is entered, within fifteen days, or that the decree will be enrolled without such taxed bill.

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RULE 184.

If party neglects to file taxed bill, decree may be enrolled without it. If the party on whom such notice is served, neglects to file his taxed bill of costs within the time prescribed, the party giving such notice, on filing an affidavit of the due service thereof, may have the decree enrolled, without annexing thereto the taxed bill of the party who has thus neglected to file the same.

RULE 185.

Party neglecting to furnish bill of his costs, to lose same. Where such taxed bill is received at any time before the actual enrolment of the decree, it shall be considered as in time, and shall be annexed to the enrolment, as required by law. But if any party neglects to file his taxed bill of costs in the office where the final decree is entered, until

after such decree has been regularly enrolled, he shall forfeit his right to costs under the decree.

ADDITIONAL RULES ADOPTED APRIL 23d, 1830.

RULE 186.

The papers which must be attached together, and annexed Papers to be annexed to an enrolled decree. to the final decree on enrolment, are the original bill, or petition, and all other pleadings in the cause, including exceptions to pleadings, reports thereon, and exceptions to such reports, petitions to revive, or in relation to any change of parties, or in any way affecting the merits of the cause; and all reports affecting the merits, or which are necessary to explain the decree, together with the original taxed bills of costs, of such of the parties as are entitled to costs under the decree.

RULE 187.

The statement or abstract of the proceedings shall state Statement or abstract of proceedings. as concisely as practicable, the time of filing the original bill, the defendants who appeared and answered and those *who appeared and suffered the bill to be taken as confessed against them, and the defendants against whom the same was taken as confessed, for want of appearance; distinguishing those who neglected to appear after a personal service of process, from those who were proceeded against as absentees. It shall also show the changes of parties, which have occurred during the progress of the cause, and the manner in which the new parties were brought before the court, or made parties to the suit, so far as the same can be ascertained from the minutes of the court, and the papers on file; and such other proceedings in the cause shall be recited therein, as may be necessary to a correct understanding of the decree. [*631]

RULE 188.

Officers to furnish necessary information. It shall be the duty of the several officers of this court upon the written request of the register, assistant register, or clerk, with whom the final decree is entered, to transmit to him any information contained in the records of their respective offices which may be necessary to enable him to prepare the statement or abstract in the manner directed in the preceding rule.

ADDITIONAL RULES ADOPTED APRIL 5TH, 1831.

RULE 189.

Bill filed by creditors against debtor to reach equitable interests, what it must state. Where a creditor, by judgment or decree, files a bill in this court against his debtor, to obtain satisfaction out of the equitable interests, things in actions, or other property of the latter, after the return of an execution unsatisfied, he shall state in such bill, either positively or accordingly to his belief, the true sum actually and equitably due on such judgment or decree, over and above all just claims of the defendant by way of off-set or otherwise. He shall also state that he knows, or has reason to believe, and does believe, the defendant has equitable interests, things in action, or other property, of the value of one hundred dollars or more, exclusive of all prior just claims thereon, which the complainant has been unable to discover and reach by execution on such judgment or *decree. The bill shall likewise contain an allegation, that the same is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor against the claims of other creditors; but for the sole purpose of compelling payment and satisfaction of the complainant's own debt.

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RULE 190.

Every such creditor's bill shall be verified by the oath of the complainant, or, in case of his absence from the state, or other sufficient cause shown, by the oath of his agent or attorney. Such bills may be amended of course, in the same manner as bills not sworn to, if the amendments are merely in addition to, and not inconsistent with what is contained in the original bill. But all such amendments shall be verified by oath in the same manner as the bill is required to be verified.

Such bill must be verified by oath, and may be amended.

RULE 191.

The debtor against whom such creditor's bill is filed shall not be subjected to the expense of putting in an answer thereto, in the usual manner, if he shall cause his appearance to be entered, and shall, within twenty days after service of a copy of the bill and notice of the order to answer, deliver to the complainant, or his solicitor, a written consent that an order may be entered taking the bill as confessed, and for the appointment of a receiver; and for a reference to take the examination of the defendant in conformity to this rule. Upon presenting such written consent to the court, the complainant may have a special order, founded thereon, directing the bill to be taken as confessed against the debtor; and referring it to such master as the court may designate in such order, to appoint a receiver with the usual powers, and to take from him the requisite security. The order shall also direct the defendant to assign, transfer, and deliver over to the receiver, on oath, under the direction of the master, all his property, equitable interests, things in action, and effects; and that he appear before the master from time to time, and *produce such books and papers, and submit to such examination as the mastershall direct, in relation to any matter which he might have been legally required to disclose

Debtor need not answer the bill, but may consent that it be taken as confessed, and that a receiver be appointed. What the order by consent must state.

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if he had answered the bill in the usual manner. The expense of taking down such examination by the master shall be paid by the complainant, in the first instance, and may be taxed and allowed to the latter as a part of his necessary costs in the suit. The complainant shall, also be at liberty to examine witnesses before the master as to the property of the defendant, or as to any other matter charged in the bill, and not admitted by the defendant on such examination.

RULE 192.

Receiver's
powers and
duties.

Every receiver of the property and effects of the debtor, appointed in a suit upon a creditor's bill, shall unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of doubtful character. He may also sue in the name of the debtor, where it is necessary or proper for him to do so; and he may apply for, and obtain an order of course, that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by the order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

*RULE 193.

Where several bills are filed by different creditors against the same debtor, no more than one receiver of his property and effects shall be appointed, unless the first appointment has been obtained by fraud or collusion, or unless the receiver is an improper person to execute the trust. The receiver shall give security sufficient to cover the whole property and effects of the debtor, which may come into his hands by virtue of his office; and he shall hold such property and effects for the benefit of all creditors who have commenced, or shall commence, similar suits during the continuance of his trust, to be disposed of according to their legal or equitable priorities.

RULE 194.

It shall be the duty of the master to whom the appointment of the receiver is referred, in any such suit, to ascertain whether any other suit has been commenced against the debtor. If any other suit has been commenced, the complainant therein shall have notice to attend before the master, and shall likewise have notice of all other proceedings in relation to the said receivership, before the master or the court, in like manner as if he were a party to the suit, in which the receiver is appointed; and he may except to the report, or apply to the court for directions to the receiver, in like manner. Where another suit is commenced after the appointment of a receiver, the same person may be appointed receiver in such subsequent suit, and shall give such further security as the master executing the last order shall direct. He shall also keep a separate account of any property or effects of the debtor which have been acquired since the commencement of the first suit, or which may be assigned to such receiver under the appointment in the last cause.

*RULE 195.

Effect of the
injunction on
creditor's bill.

No injunction issued upon any such creditor's bill shall be construed to prevent the debtor from receiving and applying the proceeds of his subsequent earnings to the support of himself or of his family, or to defray the expenses of the suit, or to prevent him from complying with any order of this court, made in any other cause, to assign and deliver his property and effects to a receiver; or to restrain him from making the necessary assignment to obtain his discharge under the insolvent laws; unless an express provision to that effect is contained in the injunction. Neither shall such injunction prevent any other creditor from levying upon such property of the debtor as he may be able to find and reach by execution, previous to the entry of an order for a sequestration, or for the appointment of a receiver. But a special clause may be inserted in the injunction, restraining the debtor from confessing a judgment, for the purpose of giving any other creditor a preference over the complainant, or from doing any other act to enable other creditors to obtain the property of the debtor, which the complainant was unable to discover or reach by execution.

AN
INDEX
TO THE
PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

A

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6, 25.

AGREEMENT.

1. Where D. agreed with S. to exchange farms with him, and S. agreed to pay D. at the rate of \$37.50 per acre for the difference in quantity between the farms, and D. and S. also at the same time entered into an agreement, by which they bound themselves to correct any error which should subsequently be discovered, as to the number of acres contained in either of the farms upon a survey thereof, provided the correction was made by the first day of April then next ensuing; and D. afterwards, but after the said first day of April, caused the two farms to be surveyed, and ascertained that there had been an error as to the quantity in the farm sold to S. by D., S. having paid for a less number of acres than that farm contained, and S. refused to correct the mistake; it was held, that the time mentioned in the agreement was not of the essence of the contract, and S. was decreed to pay the difference between the estimate and the actual number of acres, accord-

ing to the agreement, together with the costs of the suit. *Dumond v. Sharts*, 183

2. A fair and bona fide purchase of a chose in action in the ordinary course of trade or business, or for the purpose of securing an antecedent debt, is not unlawful. *Ward v. Van Bokkelen*, 289

3. But the purchase of a mere foundation of an action by a party who has no interest in the controversy, with the express object of commencing a suit thereon and for the purpose of harassing a defendant or of speculating out of the litigation, is illegal; and a court of equity will not sustain a suit in favor of such purchaser. *id*

4. Where a loan is to be repaid by an investment in merchandise for the lender, the merchandise must be estimated at its actual cost in specie or other circulating medium, which is a legal tender at the place of payment, and not at its nominal cost in a depreciated or fictitious currency. *Colton v. Dunham*, 263

5. No person can make a valid contract while he is deprived of his reason by intoxication. *Prentiss v. Achorn*, 30

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AMENDMENTS.

See PRACTICE.

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APPEAL.

1. Where a party has released all his interest in a suit, he has no right to appeal from an order made therein which cannot prejudice him, although it may be wrong as against other parties. *Steele v. White*, 478

2. An appeal cannot be sustained by a person who cannot be injured by the alleged error of the judge *a quo*, unless he is the legal representative of a party who may be injured thereby. *id.*

3. Where an interlocutory decision has been made, the court has no power to extend the time for appealing, it being fixed by statute. *Townsend v. Townsend*, 413

4. Nor can the court, to enable a party to appeal, vacate the order and cause it to be entered as of a more recent date. *id.*

See PRACTICE. Costs, 1, 2, 6, 7.

ARREST.

1. Where the defendant was in contempt for not putting in an answer, and an attachment had been issued against him, upon which he could not be found; and afterwards, upon his application to the proper officer for his discharge under the insolvent act, the complainant, with the view of procuring his arrest upon the attachment, obtained an order for his personal examination before such officer, and after such examination of the defendant was closed, and as he was leaving the office, the complainant caused him to be arrested upon the attachment, it was held, that as the defendant was arrested by such an improper contrivance, he ought to be discharged. *Snelling v. Watrous*, 314

2. An attachment for the non-payment of costs only, although in form a criminal, yet in substance is a civil proceeding, and a party will be entitled to the like protection from arrest thereon, as on other civil process, during his attendance as a party or witness before some court or officer, and a reasonable time to go and return. *id.*

3. Whether the like protection would be extended to cases where the court can punish by fine and imprisonment upon an attachment to enforce a civil right or remedy? *Quære. id.*

ASSETS.

See RECEIPTS AND ADMINISTRATORS, 4, 50, 6, 7.

ASSIGNMENT AND ASSIGNEE.

1. Where an absolute assignment of all the assignor's property and choses in action, contained a provision that the assignor would, with all convenient speed, make out an inventory of such property and choses in action, and which inventory when made out, was to be considered a part of the assignment; it was held, that the assignment conveyed a present interest to the assignee, and that its taking effect did not depend upon the making out of the inventory. *Key v. Brush*, 311

2. If the assignor neglects to furnish the schedule required by the assignment, the assignee may file a bill for discovery against him, and also to obtain a delivery of the books and securities; and he will also be entitled to an injunction against the assignor restraining him from wasting the property. *id.*

3. Where an insolvent debtor assigns all his property to his surety for his indemnity, the surety is entitled to the possession of the property so assigned, in order to discharge the responsibilities which he has assumed for the debtor. *id.*

4. The creditors of the insolvent debtor to whom the surety is liable, can also compel the appropriation of the property in the manner directed by the assignment. *id.*

5. If the assignee becomes insolvent, the assignor may apply for the appointment of a receiver to execute the trust declared in the assignment. *id.*

6. Where an assignee of a patent right sold the same, and at the time of the sale exhibited a machine as the one which he then supposed to have been patented, but which afterwards was discovered to be different from the one actually patented, as described in the specification, the deed of assignment and a note given for the purchase money, and an accompanying agreement in relation to the sale of the patent right,

were ordered to be delivered up and cancelled; the whole transaction having been founded upon a mistake as to a matter of fact. *It was also held*, that the vendee was not entitled to the damages which he had sustained in consequence of such purchase; but that if any part of the purchase money had been paid, he would have been entitled to have the same refunded. *Burrall v. Jewett*, 134

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BILL.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

Where the endorsers of an accommodation note lend their names to the drawer, without any limitation or restriction as to the manner in which the note is to be used, he has a right to apply it to the payment or security of an antecedent debt; or to sustain his credit in any other way. *Grandin v. Le Roy*, 509

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See EXECUTORS AND ADMINISTRATORS, 15, 16, 17. PRINCIPAL AND AGENT, 1.

COMPROMISE.

Where a person interested in a suit voluntarily compromises the same, without any fraud or imposition practised upon him, he cannot be relieved from the compromise, although he shows it was not beneficial for him, or shows that he had the right to recover in the suit in point of law. *Steele v. White*, 473

CONSPIRACY.

A fraudulent combination to commence suits against a person, with the view of extorting money from him, is an indictable offence, and the persons guilty of it may be punished for a conspiracy. *Leggett v. Postly*, 599

See EVIDENCE, 1.

CONSTITUTIONAL LAW.

See COURTS, CIR. U. S. 1, 2, 3

CONTEMPT.

1. Where a party was directed to deposit certain books in the master's office, with liberty to the adverse party to inspect and take extracts from such parts as related to certain partnership transactions, and in obedience to the order the books were deposited in the master's office, with the parts thereof which did not relate to the partnership transactions sealed up, and during a temporary absence of the master the adverse party, who was inspecting the books, broke open the parts which were so sealed up, and which contained the private memoranda and remarks of the party who deposited the books, in relation to his private business transactions, it was held, that this act of the

adverse party was a contempt of the court.
Dias v. Merle, 494

2. It is the ordinary practice of the court when books are directed to be produced for the inspection of the opposite party, to permit those parts to be sealed up which do not relate to the subject matter of litigation; and courts of record have uniformly protected suitors against an unwarrantable interference of the adverse party with rights of this description, by proceeding against the offender as for a contempt. *id.*

3. The revised statutes have made it the duty of the court, in a proceeding by attachment to enforce the civil remedies or to protect the civil rights of parties, to impose a fine sufficient at least to indemnify the relator for the injury sustained by the contempt and to satisfy his costs and expenses. *The People v. Spalding*, 326

4. Manner of proceeding where a defendant is brought into court on an attachment for a contempt. *The People, ex rel. Lovett v. Rogers*, 103

5. Where, from the answer of the party to the interrogatories filed, it appeared that he was in contempt for refusing to obey an order to deliver over certain property to a receiver, he was ordered to be committed to close custody until he complied with the former order of the court and paid the costs of the proceeding. *id.*

6. The costs which the party is bound to pay must be specified in the order of the court and in the mittimus. *id.*

7. Form of an order of commitment for a contempt. *id.*

8. Where a party perseveres in his refusal to deliver over property to a receiver, the property may be sequestered, and his servants and agents, &c., will be prohibited from delivering it to him or applying it to his use on pain of contempt. *id.*

See ARREST, 1, 2, 3. INJUNCTION, 15. LUNATICS, 8, 10. PRACTICE, 76.

CONTRACTS.

See AGREEMENT. FRAUD, 2, 3, 9. INFANT, 5, 6, 7, 8, 9, 10, 11. LUNATICS, 6, 12, 13, 14.

CORPORATIONS

See PARTIES, 6. PRACTICE, 39. RECEIVER, 3.
4. SPECIAL PERFORMANCE, 1, 2. STATUTES, 2, 3.

COSTS.

I. *Costs in general; when granted, and when refused; when charged on the person, and when on the fund.*

II. *Taxation; (a) what charges are taxable; (b) duty of taxing officer; (c) re-taxation.*

III. *Security for costs.*

COSTS I.

Costs in general; when granted and when refused; when charged on the person, and when on the fund.

1. Where a defendant gave notice of his intention to appeal from the decision of a vice chancellor on an interlocutory motion, and that he should bring on the hearing of such appeal on the next motion day before the chancellor; and the complainant's counsel attended on that day to oppose the application, but no appeal was in fact entered, the defendant was charged with the costs of opposing. *Mechanics' Bank v. Snowden*, 299

2. The chancellor has jurisdiction to award such costs, although the cause is not regularly before him by appeal. *id.*

3. Where a bill, in addition to the discovery sought, contains a prayer for general relief, and a replication is filed to the answer, the defendant cannot obtain an order for costs on motion, as upon a mere bill of discovery. *McDougall v. Miln*, 325

4. If there is no ground for relief in such a case, the defendant must obtain the usual orders to produce witnesses and to close the proofs, and then bring the cause to a hearing in the usual manner, in order to obtain his costs. *id.*

5. Where a suit had been commenced at law by the Bank of Niagara, previous to its insolvency, and the receivers of the bank after their appointment, elected to proceed with the suit, and upon the trial the plaintiffs were nonsuited, it was held, that the defendant was entitled to his costs of the suit, down to, and including the entering of

- the nonsuit, out of the fund in the hands of the receivers. *Camp v. Niagara Bank*, 283
6. Where there are separate appeals entered at different times in relation to two distinct orders of different characters, the solicitor is entitled to an allowance for all the services necessarily rendered on each appeal until the proceedings upon the appeal are consolidated by the court. *Fulton Bank v. Beach*, 186
7. The proceedings on the remittitur to make the decree of the court of errors a decree of the court below, and the enrolment of the decree and the execution for the costs awarded by the appellate court, are a necessary part of the costs on the appeal, and are to be taxed in the same bill with the other costs and annexed to the enrolment of the decree of the court of errors. *id.*
8. Where a cause, at the hearing, is directed to stand over for want of parties, if the defendant has not made the objection previous to that time, neither party ought to have costs, as against the other, for the extra expense occasioned by that proceeding. *Rogers v. Rogers*, 459
9. Where a cause stood over at the hearing, with leave to file a supplemental bill, and nothing was said as to the costs; and a subsequent decree in the cause directed the defendant to pay all the complainant's costs not previously disposed of, *held*, that the costs of the supplemental bill were embraced by the decree. *id.*
10. Where a party successfully opposes a motion, and nothing is said about costs in the order denying the application, he is entitled to his costs of opposing, as costs in the cause, if he obtains a decree for costs. *id.*
11. Where a witness on his cross-examination is interrogated as to matters which are irrelevant and improper, and which cannot benefit either party in the suit, the party at whose request such cross-examination was had is chargeable with the examiner's fees for drawing, engrossing and copying such part of the testimony as was useless or irrelevant. *Stafford v. Bryan*, 45
12. If the depositions of witnesses are unnecessarily prolix or irrelevant, although the solicitor at whose request they were taken down may be answerable to the examiner for his fees, he cannot be allowed therefor on the taxation of the costs, even as against his own client. *id.*
13. Where there is a general decree for costs against the complainant, he is not chargeable with the extra expense which has been produced by the neglect of the defendant to put in a perfect answer at first. *id.*
14. But the draft and copies of so many folios of the further answer as would have been necessary to make the first answer perfect, or as have been made necessary by subsequent amendments of the bill, are properly taxable. *id.*
15. Where a party obtains a general decree for costs in the cause, he is entitled to have taxed the costs of a successful interlocutory motion, if no direction as to costs was given at the time, unless such application was granted as a mere matter of favor, or to relieve the party from the consequences of his own default. *id.*
16. The party opposing a motion unsuccessfully is not entitled to the costs of opposing, as costs in the cause. *id.*
17. The party making an unsuccessful motion is not entitled to the costs of such motion; but the party opposing the same is entitled to his costs, as costs in the cause, unless a different direction is given at the time. *id.*
18. In a case of great hardship, where the complainants had reason to suppose that the conduct of the defendants was fraudulent until they put in their answer, which fully explained the circumstances of the case, the court dismissed the bill without costs. *Lupin v. Marie*, 170
19. If persons are made parties defendants unnecessarily, the bill will be dismissed as to them with costs. *Covenhoven v. Shaler*, 123
20. Where from the conflicting claims of the defendants the complainant is compelled to resort to a bill of interpleader, he will be allowed his costs. *Bedell v. Hoffman*, 199
21. On a bill in the nature of a bill of interpleader, costs are not a matter of right, but rest in the discretion of the court. *id.*
22. Where a bill of interpleader is properly filed, the complainant is entitled to his costs out of the fund. *Aymar v. Gault*, 284
23. But to entitle the complainant to costs out of the fund, the bill of interpleader must have been necessarily filed. And it must also have been necessarily and prop-

erly filed against all the defendants. *Badeau v. Rogers*, 209

24. If one of the defendants suffers the bill of interpleader to be taken as confessed against him, he will be personally charged with all the costs which have been produced in consequence of his unjust claim upon the fund. *id.*

25. Where amendments are made to a bill and the solicitor unnecessarily makes a re-engrossment or a full copy of the original matter, he will not be entitled to an allowance for the same in the taxation of his costs. *The Bennington Iron Co. v. Campbell*, 159

See CONTEMPT, 3, 5. DEED, 1. DOWER, 7. EXECUTORS AND ADMINISTRATORS, 8, 9. HUSBAND AND WIFE, 27, 29, 30, 31. INFANT, 1, 2, 3, 4. JURISDICTION OF CHANCERY, 33. PRACTICE, 32, 47, 48. TRUST AND TRUSTEE, 4.

COSTS II.

Taxation; (a) what charges are taxable; (b) duty of taxing officer; (c) retaxation.

(a) What charges are taxable.

26. Copies of the opinion of the court furnished to the master on a reference are not taxable. *Rogers v. Rogers*, 460

27. The solicitor is entitled to charge for a notice of the taxation of his costs in addition to the specific allowance in the fee bill for a copy of the bill of costs, to be delivered to the adverse party with such notice. *id.*

28. The solicitor cannot be allowed for an engrossed copy of charges or discharges before the master; nor for engrossing objections to the draft of the master's report. The allowance for engrossed copies to file, applies only to copies of such papers as are to be filed in the register's or clerk's office. *id.*

29. A charge for instructions as to the manner of serving the subpoena on a defendant is not taxable, and no allowance for serving the subpoena can be made by way of disbursement beyond the sum fixed by the fee bill. *id.*

30. Where a motion is made or opposed by counsel other than the solicitor on record, the attendance fee of the solicitor is taxable, although he did not attend in person; but where the solicitor makes or opposes the

motion himself, and is allowed therefor as counsel, he cannot charge an attendance fee as solicitor also. *id.*

31. No allowance can be made to the solicitor for attending the hearing of a calendar cause, unless he attends in person. *id.*

32. The charge for perusing, amending, and signing pleadings, can only be allowed when the service is actually performed by counsel other than the solicitor in the cause; and where the name of the solicitor alone is signed to the engrossed pleadings as counsel, the presumption is, that no other counsel perused and signed the drafts. *id.*

33. The charge for perusing and settling a decree, applies to a final decree only, and it cannot be allowed on a mere decretal order. *id.*

34. But an affidavit of service of a notice of the examination of a witness is not taxable, unless it becomes necessary to make and use such an affidavit on some special application to the court. *id.*

35. Where the examination of several witnesses is noticed for the same time, only one notice is necessary; and a notice of the examination of a witness, for the examiner, is not taxable. *id.*

36. Where the whole travel of a witness in going and returning is less than fifteen miles, no allowance for travel can be made, unless it appears that he was obliged to come so early, or was detained so late, that he could not come and return on the day of his attendance. If the whole distance both ways is over fifteen miles and under thirty, one day should be allowed for travel; and if over fifteen miles each way, one day should be allowed for the witness to come, and one to return, independent of the time he is detained for examination. *id.*

37. Charges for disbursements to witnesses, beyond the amount of their per diem allowance, are not taxable against the adverse party. *id.*

38. Where travelling fees are claimed, the affidavit should state the probable distance travelled by each witness. *id.*

39. Where depositions are drawn by the solicitor, under a stipulation between the parties, no higher charge can be allowed for the draft or engrossment thereof than if the service had been performed by the proper officer of the court. *id.*

40. A copy of the pleadings and depositions for the use of counsel is not taxable against the adverse party; the abbreviation of the pleadings and depositions for the use of counsel is all that can be allowed. *id.*
41. If counsel, other than the solicitor, is actually employed in the cause, retaining fees both for solicitor and counsel are taxable, although the name of the solicitor only is subscribed to the pleadings as counsel. *id.*
42. Instructions to search for judgments, &c., are only taxable in mortgage cases, and others of that description, where, by the practice of the court, it is necessary to make all the incumbrancers parties to the suit. *id.*
43. Where deeds and other writings or parts thereof are incorporated into pleadings, they cannot be charged as a part of the draft of such proceedings. *id.*
44. A copy of the subpoena to annex to the affidavit of service is unnecessary, and not taxable; the original subpoena should be annexed. *id.*
45. Three folios are allowed for the draft and engrossments of subpoenas for witnesses; and two for the draft and copies of subpoena tickets. *id.*
46. Twelve and a half cents is the proper allowance for serving a subpoena on a witness in chancery. *id.*
47. A written request to the register to enter an order is in the nature of a precept, and cannot be taxed under the revised statutes. *id.*
48. Where a witness is directed to be examined on written interrogatories, an engrossed copy of the interrogatories to be filed with the testimony, is taxable. *id.*
49. It is not necessary, where the copy of a pleading is served on the adverse party, to give him notice that it is a copy; and no allowance can be made on taxation for such notice. *id.*
50. All charges for notices not required by the rules and practice of the court, should be rejected by the taxing officers as useless and unnecessary services. *id.*
51. An affidavit of serving a notice of the order to answer is taxable, if actually made, although it is afterwards rendered unnecessary by the putting in of the answer. *id.*
52. The charges for attending the master to obtain his signature to a summons, and for attending to obtain his report after it has been completed, are not provided for by the fee bill, and are not taxable. *id.*
53. No charge for counsel attending prepared for argument, where the cause is not reached on the calendar, can be allowed. *id.*
54. A second fee is allowed to counsel for perusing and amending a supplemental bill, or bill of revivor, when such bill becomes necessary; but not for perusing and signing an amended bill. *Dec v. Green,* 347
55. Where an amended bill was filed by the agreement of the parties, embracing all the facts in the case, and as a substitute for the previous bill and answers to save expense, the complainant, on taxation, was allowed for counsel perusing and amending the same, and for the usual engrossments and copies. *id.*
56. On an ex parte hearing, upon a bill taken as confessed, the solicitor is not entitled to an attendance fee. But where there is an actual attendance and argument with the counsel of the adverse party, to settle important questions arising on the bill, an attendance fee for the solicitor and a full counsel fee are taxable. *id.*
57. The statement of the nature and object of the suit, to be filed in the county clerk's office, is not a notice within the meaning of the fee bill; and is to be taxed by the folio for the draft and engrossment. *id.*
58. Notices served on the defendants in mortgage cases, under the 133d rule, are specifically provided for in the fee bill; and only 37½ cents can be taxed for each notice, including copy and service. *id.*
59. Where the injunction is allowed by the chancellor, it is an act of the court, and the charge for filing the certificate of the allowance is not taxable. *id.*
60. Notice to the register to set down the cause is not a proper charge under the present practice. The notice of the issue is the only one now taxable. *id.*
61. No charge for notices, which are not required by the rules or practice of the court, can be allowed on taxation. *id.*
62. Notice to the register to enter a decree or order is not a proper charge, as the solicitor is allowed for attending in person. *id.*

63. A charge for an engrossment, or copies of an order or decree to be entered, is improper, as it is to be entered from the draft after it is settled by the court or register. *id.*
64. The complainant cannot charge for a copy of a decree for the adverse party, unless in cases where the service of such decree on him is necessary. *id.*
65. Service of a summons upon the defendant to attend the master on the reference is all that is requisite, and an additional notice for that purpose cannot be allowed. *id.*
66. If the name of a counsellor, other than the solicitor in the cause, is signed to the pleadings, the charge for perusing and amending the same should be allowed on taxation, unless the party objecting shows affirmatively that the name of the counsel was improperly placed there. *id.*
67. No allowance can be made on taxation, as between party and party, for the personal expenses of the parties or their witnesses, or of the officers of the court, as disbursements in a cause. *id.*
68. Where a specific allowance is provided in the fee bill for the performance of any service by an officer of the court, no additional charge, by way of disbursement in the performance of such service, can be taxed in favor of such officer, or any other person. *id.*
69. On an appeal to the court for the correction of errors, a counsel fee on the motion to file the petition of appeals is not taxable, the order to file the petition being a common order; and the solicitor is only entitled to fifty cents for attending to have the same entered. *Fulton Bank v. Beach.* 185
70. The signature of only one counsel is necessary to a petition of appeal or to the answer to the same, and only one counsel fee is taxable for that service. *id.*
71. The solicitor is to be allowed for the draft of original matter to be inserted in a case for the court of errors on appeal; and for two written copies of the case including the matter not original. *id.*
72. No allowance can be taxed for abbreviating the case; for if properly made, it is of itself an abbreviation of the pleadings and proofs, &c. *id.*
73. The points for the court of errors constitute a part of the case, and should be estimated as a part thereof upon the taxation. *id.*
74. A retaining fee is not allowed to a solicitor and counsel upon opposing a motion, founded upon a petition, for instructions to a receiver in the discharge of his duty. *Ex parte Johnson,* 283
75. Upon a denial of such an application, the like costs must be taxed, as are allowed for resisting a special motion. *id.*
76. Upon applications for commissions of lunacy and other proceedings of a like character, if a solicitor is actually employed to conduct the proceedings, he is entitled to a retaining fee. *id.*
77. But a retaining fee to counsel is only allowed where counsel is actually employed in a cause or suit strictly so called. *id.*
78. Only two copies of the bill or answer in addition to the engrossed copy to file are to be allowed on a taxation. *Stafford v. Bryan,* 46
79. The jurat should be drawn up by the solicitor in the form prescribed by the 18th rule, and charged as part of the folio contained in the bill or answer, and not as a separate affidavit. *id.*
80. Only the abbreviations of the pleadings and depositions in a cause for the use of counsel are taxable, and not full copies of such pleadings and depositions. *Decaters v. La Farge,* 411
81. Only one counsel or solicitor's fee is to be allowed for the whole decree or order; and it is improper to tax separate fees for each distinct point or special direction contained therein. *Fulton Bank v. Beach,* 186
82. Under the fee bill in the revised statutes, the solicitor is not entitled to charge by the folio for the draft or copies of his bill of costs. *Stafford v. Bryan,* 46
- (b) Duty of taxing officer
83. If the taxing officer on the taxation of a bill of costs has doubts as to the correctness of a charge, he should reject it. *Rogers v. Rogers,* 400
84. Bills of costs which are to be annexed to the decree on enrolment must be fairly engrossed, without unnecessary erasures or interlineations, before they are certified of

the taxing officer; and if they are not in that situation, he should direct them to be re-engrossed. *Stafford v. Bryan*, 46

85. Where postage or other disbursements are charged, each item of such disbursements, and the occasion and circumstances of the expenditure, should be particularly specified in the bill of costs, and sworn to. *Rogers v. Rogers*, 459

86. It is the duty of the taxing officer to see that the several provisions of the revised statutes relative to the taxation of costs are complied with, whether the taxation is opposed or not. *id.*

See *ante*, 50, 61.

(c) *Re-taxation.*

87. It is the duty of a party who is dissatisfied with the taxation as to particular items in the bill of costs, to bring the questions as to such items directly before the court by a motion on his part, although the adverse party applies for a re-taxation as to other items. The petition or other papers on which an application for a re-taxation is founded, should distinctly refer to, or point out the particular items or parts of the bill of costs as to which a re-taxation is sought. *Rogers v. Rogers*, 460

88. If a party insists upon items in his bill which are not legally taxable, he will be charged with the expense of an appeal from the taxation as to such items. But if the adverse party appeals to the court from the taxation of other items also, which were properly allowed, each party may be left to bear his own costs, on the application for a re-taxation. *Doe v. Green*, 348

89. On an application for a re-taxation, where the pleadings were before the taxing officer, the court will presume the number of folios were correctly taxed, unless there is an affidavit of a mistake in that respect. *Rogers v. Rogers*, 458

COSTS III.

Security for Costs.

90. Where the complainant has actually removed from the state with his family, and changed his residence, the defendant is entitled to security for costs, although there is a probability that the complainant may return at some future day. *Gilbert v. Gilbert*, 608

COURTS, CIRCUIT OF U. STATES.

1. The circuit court of the United States alone has jurisdiction of suits to recover damages for the infringement of patent rights. *Burrall v. Jewett*, 134

2. The judicial power of the United States extends to all cases arising under the constitution and laws of the general government; but the federal courts can only exercise judicial power in cases in which it has been delegated to them by the laws of congress. *id.*

3. The act of the 15th of February, 1819, extended the jurisdiction of the circuit courts of the United States to suits both at law and in equity arising under the patent laws; but it does not render the jurisdiction of those courts exclusive in such cases. *id.*

COVENANT.

1. Where a covenant was contained in a lease, on the part of the lessee, to pay all taxes and assessments which might be imposed on the premises by authority derived from the United States, the state of New York, or from the corporation of the city of New York, and an improvement was made by the corporation of New York in the opening of La Fayette Place, which took a part of the leasehold premises, it was held that the lessee was chargeable with the amount of the assessment upon the interest of the lessor in the premises. *Astor v. Miller*, 68

2. Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach upon each parcel pro tanto. *id.*

3. And the assignee of each part will be answerable for his proportion of any charge upon the land which was a common burden upon the whole, and will be exclusively liable for the breach of any covenant which related to that part alone. *id.*

See EXECUTORS AND ADMINISTRATORS, 20, 21. JURISDICTION OF CHANCERY, 3. MORTGAGE 10, 13. STATUTES, 6.

CREDITORS.

See DEBTOR AND CREDITOR. EXECUTORS AND ADMINISTRATORS, 5, 6. HEIRS AND DEVISEES, 1, 2, 3, 7. HUSBAND AND WIFE, 3. LEG-

ACT, 3, 4. LIEN, 1, 4, 5, 6, 7. LUNATICS, 9, 10, 11, 14. PARTIES, 7, 12. PARTNER-SHIP, 3, 4. PRACTICE, 70, 71, 72.

CRIMES.

See DRUNKENNESS, 1.

CROSS BILL.

See PLEADINGS. PRACTICE.

CURTESY, TENANT BY.

See DESCENT, 3.

D

DAMAGES.

See DOWER, 7, 8, 9, 10.

DEBTOR AND CREDITOR.

1. An assignment after the lien of a creditor has attached by the filing of a bill, only conveys the property to the assignee, subject to that lien. *Corning v. White*, 567

2. The judgment creditor who first files his bill in chancery obtains a priority in relation to the property and effects of the defendant which cannot be reached by execution at law. *id.*

3. A creditor may file his bill to set aside a fraudulent conveyance of the real estate of his debtor as soon as he has obtained a judgment, which is a lien on the land. *The Mohawk Bank v. Atwater*, 54

4. Where there is no allegation of fraud or collusion between the complainant and the sheriff, the return of an execution at law unsatisfied is sufficient to authorize the filing of a judgment creditor's bill, although the sheriff was told the defendants had some interest in property which might be sold on the execution. *Storrs v. Kelsey*, 418

5. Upon a judgment creditor's bill the complainant may reach the defendant's interest in the effects of a copartnership, after payment of the partnership debts, and satisfying all prior equities in favor of his copartners. *Eager v. Price*, 334

6. The policy of the present laws of this

state is to relieve the unfortunate debtor from imprisonment; but, at the same time, to compel him to surrender up all his property and effects, or so much thereof as is necessary to satisfy the just claims of his creditors. And the court of chancery will not permit him, by any shift or device, to place his property beyond their reach. *id.*

7. The judgment creditor only acquires a specific lien upon the equitable property which belonged to the defendant at the time of filing his bill, or upon the proceeds thereof. If he wishes to obtain a priority as to subsequently acquired property, he must file a supplemental bill. *id.*

8. The court will not permit supplemental bills to be filed in such a case, merely to harass the defendant, or to deprive him and his family of his daily earnings. *id.*

9. Where a debtor with an intention of defrauding his creditors executes a conveyance of his property without any valuable consideration being paid by the grantee, the conveyance is void as against such creditors although the voluntary grantees was not privy to the fraud. *The Mohawk Bank v. Atwater*, 54

10. Where R. R. & I. R., partners, confessed a judgment to W. their brother-in-law, for \$25,000, under which the household furniture of R. R. together with other property was sold, and W. at the sale purchased the furniture and left it with R. R.; and it appeared that the judgment was given to W. to secure a debt due him of \$2,850, and to apply the residue of the said judgment when collected in paying such of the creditors of R. R. & I. R. as R. R. should designate; and the property of the firm which could not be reached by execution was assigned by R. R. to I. R. in trust to pay himself the costs of executing the trust, the expenses of obtaining R. R.'s insolvent's discharge, and the expenses of all suits at law or in equity, and to apply the residue in payment of the debts of the firm in the order prescribed in a schedule annexed; S. a creditor of R. R. & I. R. prosecuted his debt to judgment against them, and issued an execution thereon which was returned unsatisfied; it was held, that the judgment to W. was given to defraud creditors, and that the assignment from R. R. to I. R. was also fraudulent and void as against the creditors of R. R. & I. R. and that S. was entitled to receive out of the property so assigned the amount of his judgment, with interest and his costs of suit. *Swall v. Russell*, 178

11. Where an insolvent debtor assigned all his property to C. in trust to pay, in the first place, certain preferred creditors, and afterwards to distribute the residue rateably between such of his general creditors as should, within one year from the date of that conveyance, accept the provision made therein for them, and release him (the insolvent) from all further claims; and D. a creditor of the insolvent did not receive any notice of the trust until after the expiration of the one year; but as soon as he received such notice, applied to C. the trustee, to be permitted to accept the provision made by the trust deed, upon a compliance on his part with the conditions thereof, and the trustee refused such permission; and the insolvent debtor was afterwards discharged under the insolvent act, and assigned all his interest in the surplus, which by the trust deed was to be refunded to him, to K. for the benefit of his creditors generally: *it was held*, that D. had an equitable right to his proportion of the trust fund, upon a compliance with the conditions imposed, he not having had notice of the trust within the year, and having done nothing since he had such notice inconsistent with his offer to accept of the provision made for him in the trust deed. *Decaters v. Le Ray De Chaumont*, 490

12. Where, under such circumstances, a creditor, in consequence of want of notice, mistake, or accident, was unable to comply with the terms prescribed, within the time limited, and who has done nothing inconsistent with an acceptance of the provision made in his favor, he will be admitted to a share of the fund, provided he signifies his election to do so, in a reasonable time. *id*

13. But such of the creditors as, within the time limited, had notice of the creation of the trust, and neglected or refused to accept of the provision made therein for them, are precluded from any participation in the fund, and their only claim will be upon the surplus, if any there should be remaining, after satisfying the debts of the creditors, who accepted their proportion of the trust fund upon the terms proposed. *id*

See ASSIGNMENT AND ASSIGNEE, 3, 4. EXECUTORS AND ADMINISTRATORS, 5, 6. FRAUD, 8, 9. HEIRS AND DEVISEES, 1, 2, 3, 4, 5, 6, 7. INTEREST, 6, 7. JURISDICTION OF CHANCERY, 18, 19, 20, 21, 22, 23, 24, 25. LEGACY, 3, 4. PARTIES, 7, 12. PARTNERSHIP, 3, 4, 5, 6. PLEADINGS, 10, 11. PRACTICE, 70, 71, 72. PRINCIPAL AND SURETY. RECEIVER, 5, 6.

DEBTORS, INSOLVENT.

1. An insolvent may assign his property for the benefit of all his creditors, rateably, without depriving himself of the privilege of applying for a discharge from imprisonment for debt under the statute. *Corning v. White*, 567

2. A mere naked trustee without interest, cannot become a petitioning creditor for an insolvent, without the consent of the *cestui que trust*, except in those cases specially provided for by the statute. *In the matter of Sherryd*, 603

3. Where property has been fraudulently conveyed by an insolvent debtor who afterwards obtains his discharge under the act, his interest in the property passes to his assignee for the benefit of his creditors, although such property is not embraced in the inventory. *Ward v. Van Bokkelem*, 289

See DEBTOR AND CREDITOR, 6, 11, 12, 13. PARTIES, 7, 12. PARTNERSHIP, 3.

DEED, FOR WHAT AVOIDED.

Where the defendants obtained from the ancestor of the complainants a conveyance of his property, when he was in a state of intoxication, they were charged with the costs of the suit to set aside the deed. *Prentice v. Achorn*, 80

JURISDICTION OF CHANCERY, 26, 27, 28, 29, 30. PRACTICE, 73.

DEMURRER.

See PLEADINGS.

DESCENT.

1. An unborn child after conception is to be considered in case for the purpose of enabling it to take an estate, or for any other purpose which is for the benefit of the child if it should afterwards be born alive. *Marsellis v. Thalhimer*, 35

2. But, as it respects the rights of others claiming through the child, if it is born dead, or in such an early stage of pregnancy as to be incapable of living, it is to be considered as if it never had been born or conceived. *id*

3. Where the mother dies before the birth

of the child, and the latter is delivered by the cesarean operation, it is considered in existence before its birth for its own benefit, to take the estate of the mother by descent, but not for the benefit of the father to enable him to hold as tenant by the curtesy. *id.*

4. Children born within the first six months after conception are presumed to be incapable of living, and therefore cannot take and transmit property by descent, unless they actually survive long enough to rebut that presumption. *id.*

5. The party who claims property through the child, is bound to establish the fact that it was born alive; and if the child never breathed, there is no legal presumption in favor of the fact. *id.*

DEVISE.

On a general devise of all the testator's estate, real property acquired after the making of the will, descends to the heir at law, and does not belong to the devisee. *Douglass v. Sherman,* 358

See LEGACY, 3, 4, 5, 6.

DISCONTINUANCE.

See PRACTICE, 29.

DISMISSAL OF BILL, VOLUNTARY.

See PRACTICE, 29, 30, 31.

DIVORCE.

See HUSBAND AND WIFE.

DOWER.

I. *What is a bar of dower.*

II. *In what cases the widow is entitled to damages; and when such damages can be recovered by her personal representatives.*

DOWER I.

What is a bar of dower.

1. A legal jointure, settled upon an infant before marriage, is a legal bar of her dower; and by analogy to the statute, a competent and certain provision, settled upon the infant in a l i r of dower, to which there is no

other objection but its mere equitable quality, is an equitable bar of dower. *M'Curran v. Teller and Wife,* 511

2. To make a mere equitable jointure binding on the infant, the provision should be as beneficial to her, and as certain as that required in the legal jointure to constitute a legal bar. *id.*

3. The equitable provision, to bar dower, must be a provision to take effect in possession or profit immediately on the death of the husband, and to continue during the life of the widow; and it must be a reasonable and competent livelihood for the wife, in reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the portion received with the wife on her marriage. *id.*

4. An estate for life, or during the widowhood of the grantee, is a base or determinable freehold; and if an adult actually accepts such an estate in lieu of dower, it will constitute a legal bar; but if such an estate is settled upon an infant, who has no legal capacity to consent to an acceptance of such a qualified freehold, it will not bar her dower. *id.*

5. Where the husband entered into an antenuptial contract with an infant and her guardian, by which she was to receive a certain annual sum during her widowhood, in lieu of dower, it was held, that she was not bound by the agreement, and might disaffirm the same and claim her dower, after the death of her husband. *id.*

6. But by the revised statutes, the distinction between legal and equitable jointures is abolished; and any estate or pecuniary provision made for the benefit of the wife, whether an adult or an infant, in lieu of dower, will, if assented to by her in the manner prescribed in the revised statutes, now constitute a legal bar of her dower. *id.*

DOWER II.

In what cases the widow is entitled to damages, and when such damages can be recovered by her personal representatives.

7. In a suit at law, if the dowress dies before her right is established, her personal representatives have no remedy either for costs or for the mesne profits. *Johnson v. Thomas,* 377

8. If the husband died seized, the death of the dowress, pending a suit in this court

for her dower, will not deprive her personal representatives of the arrears due at the time of her death; but they may revive the suit for the purpose of obtaining such arrears of dower. *id.*

9. But where the husband did not die seized of the premises, if a suit in chancery abates by the death of the complainant before her right to dower is established, the personal representatives are not entitled to any arrears of dower, and therefore cannot revive. *id.*

10. The revised statutes, however, have now given the widow a better remedy for her dower, and a more extended right to damages for arrears, than was provided by the former law. *id.*

DRUNKARDS, HABITUAL.

See LUNATICS, 6, 7, 8, 9, 10, 11.

DRUNKENNESS.

Voluntary drunkenness will not protect a person from liability for torts, or from punishment for crimes committed while in that situation. *Prentice v. Achorn*, 30

See AGREEMENT, 5. DEED, 1. INFANT, 12.

E

EJECTMENT.

See MORTGAGE, 13.

EXECUTION.

See HEIRS AND DEVISEES, 5, 6. MORTGAGE, 13. PRACTICE, 73. REVIVOR, 19, 20, 21. SALE, 1, 2. SHERIFF, 1.

EXCEPTIONS.

See PRACTICE.

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator cannot, either at law or in equity, set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he held the demand so purchased. *Mead v. Merritt & Peck*, 402

2. It is against the principles of sound policy to permit executors to purchase up claims against the creditors of the estate of the testator, for the purpose of obtaining a set off in equity. *id.* 403

3. An executor cannot set off in chancery an original debt due to him personally, against a claim of the defendant on the estate. *id.*

4. An executor who is a debtor to the estate is chargeable with the amount of the debt due by him, as assets in his hands for the payment of the debts of the testator. *Decker v. Miller*, 149

5. An executor is entitled, out of the assets in his hands, to retain a debt due him by the testator, in preference to other creditors of the same degree. *id.*

6. He is also entitled to the same preference in applying the assets in the hands of his co-executor to the satisfaction of his debt. *id.*

7. An executor who is indebted to the estate may refuse to pay out of such debt, a demand claimed against the estate by his co-executor, until he is satisfied that the other assets are insufficient to discharge such demand of his co-executor. *id.* 150

8. Where such executor has a right to ask the aid and protection of the court in paying over the debt due by him to the testator, he will be entitled to his costs out of the fund. *id.*

9. So if the executor who was the creditor of the estate had a right of preference over other creditors, and was compelled to come into chancery to obtain such preference, his costs will be paid out of the fund. *id.*

10. Where a part only of the executors qualify and accept the trust, those who qualify will have full authority without the others to execute a power to convey real estate, which is by the will conferred on the executors named therein. *Ogden and others, executors, &c., v. Smith*, 195

11. Executors who do not prove the will, are superseded by the grant of letters testamentary or of administration to others; and they cannot dispose of any part of the estate until they appear and qualify as executors. *id.*

12. Where the power to sell given to executors by the will is special, it can only be

exercised in the mode prescribed by the testator. *Pendleton and wife v. Fay & others*, 202

13. Where an executor was authorized to sell the real estate at public vendue to pay off the legacies to the children of the testator as they became of age, and he sold the property at private sale to raise money for his own use, before the legacies became payable, the sale was held to be void. *id.*

14. An executor or guardian may employ a clerk or agent and charge the estate with the expense, where, from the peculiar nature or situation of the property, the services of such clerk or agent will be beneficial to the estate. *Van Derheyden v. Van Derheyden*, 287

15. But for his own services, the executor or guardian must be confined to the allowance by way of commissions as fixed by law. *id.*

16. In stating the account of an executor or guardian, if the court makes annual rests for the purpose of charging him with interest on the annual balances remaining in his hands, his commissions on the amount received and actually disbursed during each year may be deducted at each annual rest. *id.*

17. So far as the receipts and disbursements are actually offset against each other, it is an annual settlement of the account so as to authorize the deduction of the commissions at the time of such settlement. *id.*

18. Upon an application under the statute (3 R. S. 110, § 61) to rectify certain irregularities in the sale of real estate made by an administratrix under an order of a surrogate, it was held, that an injunction to stay proceedings at law could not be granted until the report of the master came in as to the facts and the names and residences of the persons entitled to the estate, as heirs or devisees or as persons claiming under them. *In the matter of Hemiup*, 316

19. Upon the appearance of the parties entitled to the estate, a temporary injunction may be granted, to stay the proceedings at law until the question as to the fairness of the surrogate's sale is determined by the court; and a reference will be made to a master to examine the witnesses as to this point. *id.*

20. The court has no power to rectify any other irregularities in a surrogate's sale than those specified in section 61, 2 R. S. 110. *id.* 317

21. The remedy of the purchaser in other cases is either at law against the executor or administrator upon the covenants in his deed, or by bill against the heirs, upon the ground that they have been benefited by the proceeds of the sale. *id.*

See DOWER, 7, 8, 9, 10. LEGACY, 4.

EQUITY.

See MORTGAGE, 1, 2, 3, 4, 5. PARTNERSHIP, 6

EVIDENCE.

Where a fraudulent combination is established, the acts and declarations of any one of the parties thereto may be proved against the others. But only such acts and declarations as constitute a part of the *res gesta* ought to be so received. *Apthorp and others v. Comstock and others*, 483

See PATENTS, 5. WILL, 11, 12, 17.

F

FEIGNED ISSUE.

See JURISDICTION OF CHANCERY, 15, 16, 17. PRACTICE. PARTITION, 7.

FINE.

See CONTEMPT, 3.

FRAUD.

1. Where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purposes of a sheep pasture, when he knew there was a valuable mine on the lot, of the existence of which the vendor was ignorant, held, that this was such a fraud as would avoid the purchase. *Livingston v. The Peru Iron Co. and others*, 390

2. Although a simple suppression of the truth by one of the parties to a contract may not be sufficient to authorize a court to set it aside, yet, if any thing is said or done to mislead or deceive the other party to the same, the court will grant relief against the contract. *id.*

3. The court of chancery will not compel a specific performance of a contract if the

complainant intentionally concealed a material fact from the defendant, the disclosure of which would have prevented the making of the contract. *id.*

4. If the delivery of goods is procured by the fraud of the vendee, the title will not pass to him, and the vendor can reclaim the goods if they have not passed into the hands of a bona fide purchaser. *Lupin and others v. Marie and Varet*, 169

5. A purchaser, however, from such fraudulent vendee, to secure antecedent debts or responsibilities, cannot hold the goods as against the vendor. *id.*

6. So, if the delivery of the goods was conditional, the title does not pass until the condition is performed. *id.*

7. But a bona fide purchaser without notice of the fraud will be protected, even in the case of a conditional delivery. *id.*

8. Where a merchant in good credit who knows himself to be insolvent, fraudulently conceals that fact from the vendor, and purchases goods without intending to pay for them, or for the purpose of assigning them to his confidential creditors, such sale may be set aside as fraudulent. *id.*

9. Where S. owned a farm in the county of Queens, and about ten acres in addition, and made an agreement with F. to exchange with him the ten acres for six acres adjacent to the farm, and possession was respectively taken by S. and F.; and before the conveyances were executed on this exchange, S. mortgaged his farm to G., and by mistake included in the mortgage the ten acres instead of the six acres; and the mortgage was foreclosed in chancery in 1825, and the mortgaged premises ordered to be sold; and S., who was alone interested in the surplus to be raised on the sale, employed E., an auctioneer, to sell the property to pay off the mortgage; and the property was exposed to sale and bid in for S.; and E. also attended the master's sale as the agent of S., at which sale a map, which had been made of the farm including the six acres, was exhibited, as containing the property to be sold; and the property was sold with reference to the map, and for an amount much exceeding the mortgage and costs, and H. became the purchaser; and after the sale, S. obtained the legal title to the six acres; and having received the surplus moneys and becoming insolvent; upon a bill filed by H. praying for a decree to compel S. to convey to him the six acres; it was held, that S.

having obtained the whole consideration money for the land, including the six acres, under circumstances which amounted to a fraud upon H. S. would be considered as a trustee for H. and would be decreed to convey to H. the six acres. *Howland v. Scott*, 406

See DEBTOR AND CREDITOR, 9, 10. VENDOR AND PURCHASER, 1, 3.

FRAUDS, STATUTE OF.

See PLEADINGS, 21, 22, 39, 40.

GUARDIAN AND WARD.

- I. *By whom, when, and in what manner appointed.*
- II. *The duty of the guardian, and his power over the estate of his ward.*
- III. *For what causes a guardian will be removed.*

GUARDIAN AND WARD I.

By whom, when, and in what manner appointed.

1. The revised statutes have not divested the court of chancery of any of its powers as the general guardian of the persons and estates of infants; neither do they prevent the chancellor, in court, from making an order for the appointment of a guardian, or next friend, according to the former practice of the court. But where it can be done consistently with the forms of the court, and without great inconvenience and expense the court will, in the exercise of its powers, conform to the spirit of the statutory provisions. *In the matter of Frits and others, infants*, 374

2. The revised statutes do not, in terms, require a next friend to be appointed for an infant plaintiff who joins with an adult, but it is as necessary in that case to have a next friend appointed as in the case of a sole plaintiff. *id.*

3. The provision which directs the officer making the appointment of a next friend to take security to the infant in certain cases, extends to cases where the infant sues jointly with others. *id.*

4. Where a great number of infant legatees had a common interest in the prosecution of a suit, the court, on the application of the guardians of some of the infants, in

behalf of all the rest, appointed a next friend to prosecute a suit in the names and for the benefit of all the infant legatees.

id.

5. The court will not appoint a guardian ad litem for an infant defendant, upon the nomination of the complainant. *Knickerbocker v. De Freest and others*, 304

6. When the complainant applies for the appointment of a guardian for an infant defendant under the last clause of the 144th rule, he will be entitled to an order appointing such person guardian as shall then be designated by the court, unless the infant, within ten days after service of a copy of such order, shall himself procure a guardian to be appointed. *id.*

7. A copy of such order may be served personally upon the infant, if he is of the age of fourteen years or upwards, and if he is under that age, then upon his general guardian, or his relative, friend, or other person with whom he resides. *id.*

8. Upon the expiration of the ten days, upon filing an affidavit of the service of the order, and that no notice has been received of the appointment of a guardian ad litem by the infant, the complainant will be entitled to an order of course that the former order for the appointment of a guardian be made absolute. *id.*

9. In partition causes, where security is required from the guardian, the order must require the infant to procure a guardian to be appointed, and that he file the requisite security within the ten days, or that the order for the appointment of the person named by the court will be made absolute upon his filing such security. *id.*

10. Where the infant is a non-resident, special directions must be given as to the manner of service of the order, if any notice thereof shall be deemed requisite. *id.*

11. Upon an application to sell the estate of an infant under the statute, the court will appoint his general guardian, if he has one, as the special guardian. *In the matter of Wilson and others, infants*, 412

12. Where, however, it appears that the general guardian cannot procure the requisite security, another person may be appointed the special guardian to sell the property. *id.*

See PARTITION, 4. PRACTICE, 13.

GUARDIAN AND WARD II.

The duty of the guardian and his power over the estate of his ward.

13. The provision of the revised statutes, which authorizes the general guardian of an infant tenant in common, with the consent of the court of chancery, to agree to a sale of the estate, for the purpose of making partitions, does not authorize the guardian to sell to a co-tenant, but only to join with the other tenants in common in a sale of the joint interest in the property. *In the matter of G. and E. Congdon, infants*, 566

14. The court will not authorize the guardian to join in a sale, except on the report of a master that such sale is necessary and proper; and the guardian must give security for the faithful performance of his trust on such sale, and to bring the proceeds of the infant's share into court, or to invest and account for the same, as the court shall direct. *id.*

15. If a co-tenant wishes to buy the infant's share in an estate which cannot be divided, and is willing to give the fair value thereof, the general guardian should apply for liberty to sell, under the article of the revised statutes relative to the sale and disposition of infants' estates. *id.*

16. All the proceedings in the cases of special guardianship to sell infants' estates must be filed in the office where the order for the appointment of the guardian was entered. *In the matter of Seaman and others, receivers, guardians, &c.*, 409

17. A strict compliance with the 154th rule requiring guardians, receivers and committees to file inventories and accounts, will be rigidly enforced. *id.*

18. In ordinary cases, where a guardian, &c., neglects to comply with the rule, an order will be made requiring him, within twenty days after the service of a copy of such order on him personally, or at his residence in case of his absence, to file the inventory and account, and to pay the expenses of the order and proceedings thereon, or that an attachment issue against him. *id.*

19. And the order must also contain a provision requiring the register or assistant register to cause a copy of the same to be served, and to certify the default of the delinquent to the court, if he fails to comply with the order. *id.*

20. If a guardian ad litem neglects his duty to the infant, whereby such infant sustains an injury, the guardian will not only be punished for his neglect, but he will also be liable to the infant for all the damages he may have sustained. *Knickerbocker v. De Freest and others*, 364

21. It is the special duty of a guardian ad litem to submit to the court for its consideration and decision every question involving the rights of the infant affected by the suit. *id.*

GUARDIAN AND WARD III.

For what causes a guardian will be removed.

22. Where the guardian entered into a speculation with the husband of his ward, who was also an infant, in relation to her estate, and obtained a mortgage thereon from both, the court removed the guardian from his trust, and ordered the mortgage to be delivered up and cancelled. *In the matter of Cooper and wife, infants*, 34

23. It seems that the insolvency of the guardian and of one of his sureties is also a sufficient reason for the removal of the guardian. *id.*

See EXECUTORS AND ADMINISTRATORS, 14, 15, 16, 17. HUSBAND AND WIFE, 12, 13, 14, 15. INFANT, 10, 12. SOLICITOR AND COUNSEL, 1.

HEIRS AND DEVISEES.

1. Debts due by the testator are equitable liens upon his estate in the possession of his heirs or devisees, and prior in time to judgments recovered against them for their individual debts. *Morris and others v. Mowatt and others*, 586

2. But the judgment creditors of the heirs or devisees have a right to ask for the application of the personal estate, in the first place, to the satisfaction of the debts due by the testator, or that they be substituted in the place of the creditors of the testator as to such personal estate. *id.*

3. The revised statutes have prescribed a new mode, by a bill in equity, of proceeding against heirs and devisees to obtain satisfaction of the debts due from the estate. *id.*

4. And a final decree in such suit has a preference, as a lien on the estate descended or devised, over any judgment or decree obtained against the heir or devisee for his personal debt. *id.* 587

5. And a sale under an execution, issued upon such decree, will overreach, not only all judgments and decrees which may have been recovered against such heir or devisee, but also all mortgages and alienations of the estate, made subsequent to the commencement of the suit. *id.*

6. Whether a sale under an execution issued on the decree is necessary to give the purchaser a legal title, sufficient to protect him at law against a sale under a previous judgment against the heir or devisee? *Quere. id.*

7. Where a devisee of an insolvent had a mortgage which was a prior lien on the premises devised, and she entered upon the premises as devisee, and received the rents and profits thereof, held, that as between her and the creditors of the testator, she was bound to account for the rents and profits, and to allow them in part payment of the mortgage. *Chalabre v. Cortelyou and others*, 605

See DEVISE, 1. EXECUTORS AND ADMINISTRATORS, 20, 21. LEGACY, 3, 4, 5, 6.

HIGHWAYS.

The laying out of a public highway across a man's land does not divest the title of the owner, but the title remains in him subject to the public right of way over the same; and whenever the road ceases the land will revert to the original owner, or to his assignees. *Dumond v. Sharts*, 183

HUSBAND AND WIFE.

- I. *Of the wife; separate estate.*
- II. *Adultery; divorce; alimony; costs.*

HUSBAND AND WIFE I.

Of the wife; separate estate.

1. If the wife is entitled to the income of property bequeathed to her separate use during coverture, and the husband obtains possession of it for the purposes of the trust, he will be decreed to pay to her the income. *Collins v. Collins*, 9

2. Where a debt due to the wife before marriage has never been reduced into possession by the husband, it is considered the property of the wife so as to be subject to her equity for the support of herself and

children. *Smith and others v. Kane and wife*, 303 adultery charged in the bill, she may set up the adultery of the husband, or any other matter in bar of the suit. *id.* 108

3. If a creditor seeks the aid of a court of chancery to reach property of the husband which is not subject to an execution at law, he must take such property subject to the wife's equity, if she has any therein. *id.* 12. A feme covert cannot file a bill against her husband in her own name, except in the single case of a bill to obtain a divorce on the ground of adultery. *id.* 434

HUSBAND AND WIFE II.

Adultery; divorce; alimony; costs.

4. Where, upon a bill filed by the husband for a divorce *a vinculo matrimonii*, a decree dissolving the marriage contract was made, and after enrolment both parties joined in a petition to the court, requesting that the enrolment of the decree might be opened and vacated, and the decree reversed, the court granted an order according to the prayer of the petition, and dismissed the complainant's bill; but without prejudice to the rights which third persons might have acquired under the decree. *Colvin v. Colvin*, 385 13. A bill to obtain a separation merely must be filed in the name of the next friend of the wife; and if it is not so filed, the defendant may demur. *id.* 14. On a bill for a divorce, if the wife is an infant, she must prosecute or defend by her next friend or guardian. *id.* 109 15. Where an infant defendant put in an answer to a bill of divorce by her solicitor, the proceedings were, on her application, set aside for irregularity, and she was permitted to put in a new answer by her guardian. *id.* 16. Where the husband and wife are living together pending a suit for a divorce *a mensa et thoro*, and the wife is in no danger from personal violence, the court will not break up the family by placing the children under the exclusive control of either party. *Collins v. Collins*, 9

5. Cohabiting with the wife after a knowledge that she has been guilty of adultery, will be such a condonation or forgiveness of the offence as to bar the suit for a divorce. *Wood v. Wood*, 109 17. By the common law of this state, the court of chancery had no jurisdiction to decree a separation between a husband and wife, for cruel treatment, or on account of a mere canonical disability. *Perry v. Perry*, 501

6. Forgiveness of the injury by implication, from the fact of cohabitation, ought not to be held a strict bar in all cases against the wife, as she is to a certain extent under the control of her husband. *id.* 18. A marriage merely voidable is valid for all civil purposes, until its nullity has been pronounced by the proper tribunal, but by the common law, the sentence of nullity, when pronounced, renders the marriage void from the beginning. *id.*

7. The charge of adultery, whether by way of crimination or recrimination, should be stated in the pleadings in such a manner that the adverse party may be prepared to meet it on the trial of the issue. *id.* 19. That part of the common law of England which renders a marriage contract absolutely void in certain cases, forms a part of the law of this state, and may be enforced by the appropriate tribunals, independent of any statutory provisions. *id.*

8. The adultery must be charged with reasonable certainty as to time and place, and the name of the person with whom it was committed, if known, should also be stated. *id.* 20. The cruelty which entitles the injured party to a decree of separation, is that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe. *id.*

9. If the name of the person with whom the adultery was committed is not known to the party making the charge, that fact should be averred, and the time, place, and circumstances of the adultery should be stated. *id.* 21. Where a right is claimed as existing by the common law, which is incapable of enjoyment except by the direct interposition

10. If the charge of adultery is not sufficiently explicit, the objection may be made when a feigned issue is applied for. *id.*

11. Although the defendant denies the

of a judicial tribunal to give the remedy, if no tribunal has been organized for that purpose by the law making power, we may fairly presume that no such right exists; but if the right is expressly declared by the legislative power, without creating or appointing any particular tribunal to administer the remedy, the power must be exercised by some of the existing tribunals of the country. *id.*

22. The 12th section of the act of March, 1824, authorizing the court of chancery to decree a separation from bed and board, on the complaint of the husband, was not repealed in the recent revision of the laws. *id.*

23. Upon a bill filed by the husband against the wife for a divorce, upon the ground of adultery, the husband, upon the application of the wife, will be ordered to pay her a gross sum to defray the expenses of her defence, and also a reasonable sum for alimony during the pendency of the litigation, although affidavits are presented on the part of the husband, showing the guilt of the wife. *Osgood v. Osgood*, 621

24. But the application of the wife for an allowance, to enable her to make her defence, and for alimony, will be denied, unless she denies, in her petition, on oath, the truth of the charge of adultery, or shows therein some valid defence to the husband's suit. *id.*

25. The reference to the master to ascertain the truth of the facts charged in the bill is to satisfy the court, and to prevent collusion between the parties; and the husband cannot set up any matter, in opposition to the wife's claim for costs or alimony, which if set up by an answer would have been a sufficient ground for refusing a divorce. *Graves v. Graves*, 62

26. Where the wife is the defendant in a suit for a divorce, if she denies on oath the charge of adultery, or shows a valid defence by reason of condonation or otherwise, she is entitled to a reasonable allowance for her support pending the litigation, and to enable her to defend the suit. *Wood v. Wood*, 109

27. In a suit against the husband for a divorce, if he suffers the bill to be taken as confessed, and a divorce is granted, costs follow of course. *Graves v. Graves*, 62

28. The wife is also entitled to alimony if her circumstances render such an allowance either necessary or proper. *id.*

29. No allowance for costs or alimony can be made to the wife, if it appears upon the face of her bill that it is improperly filed, and that she can obtain no decree thereon. *Wood v. Wood*, 454

30. Where the wife obtains a divorce upon the ground of adultery, a reasonable counsel fee may be allowed and taxed against the husband. *Graves v. Graves*, 62

31. Where the wife has no separate estate, no decree can be made against her in favor of her husband for costs. *Wood v. Wood*, 454

See DOWER. GUARDIAN AND WARD, 22.

I

IDIOTS.

See LUNATICS.

INFANT.

1. Where a bill is filed on behalf of an infant by his next friend, the infant cannot be personally charged with the costs, unless, when he arrives at 21, he adopts the proceeding, and elects to prosecute the suit. *Waring and others v. Crane & Canfield*, 79

2. Where the suit is terminated before the infant becomes of age, the next friend will be chargeable with the costs, unless there be a fund belonging to the infant under the control of the court, and it appears that the suit was brought in good faith, and with a bona fide intent to benefit the infant; in which case the court may direct the costs to be paid out of the fund. *id.*

3. If the suit was improperly brought, and the infant, when he arrives at 21, elects to abandon it, he may apply for a reference to ascertain the fact, and the bill will then be dismissed with costs, to be paid by the next friend. *id.* 80

4. But if the suit was properly instituted for the benefit of the infant, and at 21 he elects to abandon it, he must, upon the dismissal of the bill, pay the costs of his next friend as well as those of the adverse party. *id.*

5. Where D. in April, 1818, sold land to B. an infant, and the infant upon the execution and delivery of the deed to him gave

so D. a bond and mortgage upon the premises for the purchase money; and the deed and mortgage were both duly acknowledged and recorded, and one half of the purchase money was paid to D. by B. at the time of the purchase; and B. the infant, immediately went into possession of the premises, and continued in possession until after he arrived at the age of 21 years; and then sold the same to R., who conveyed them again to other persons; and all the purchasers had full knowledge of the mortgage, which was assigned by D. to L. in 1819; it was held, that the mortgage was a legal charge upon the land, and that if the premises did not sell for a sum sufficient to discharge the amount due upon the mortgage, with the costs of the suit, B. would be liable to pay the balance. *Lynde v. Budd and others*, 191

6. The contract with the infant was not void, but only voidable at his election, when he became of age. *id.*

7. He might then have relinquished the property, and claimed a repayment of the money paid by him to the grantor at the time of the purchase. *id.*

8. But by continuing in possession after 21, and conveying the land with warranty, he affirmed the contract, and made himself liable for the payment of the residue of the purchase money. *id.*

9. The deed and mortgage being executed at the same time, formed but one contract; and the infant could not affirm such contract as to the deed and avoid it as to the mortgage. *id.*

10. An infant is only liable for necessities, when he has no other means of obtaining them except by the pledge of his personal credit. If the infant is under the care of a parent or guardian, who has the means, and is willing to furnish what is actually necessary, he cannot, without the consent of such parent or guardian, make a binding contract for articles which, under other circumstances, would be deemed necessities. *Kline and others v. L'Amoureux, committee of Stafford*, 419

11. Where a person deals with an infant, he is bound, at his peril, to inquire and ascertain the real circumstances of the infant, and whether he is in a situation to bind himself by a contract for necessities. *id.*

12. Where the defendant, an inn-keeper, persisted in harboring an infant, and furnishing him with supplies against the will and contrary to the express directions of his guardian, who was endeavoring to reform his dissipated habits, the court of chancery would not permit the defendant to retain the fruits of his improper conduct. And the defendant having obtained a judgment bond from the infant during his minority, and another a few days after he became of age, but which was overreached by an acquisition finding him incompetent to contract on account of habitual drunkenness, both judgments were decreed to be set aside and cancelled. *L'Amoureux, committee of Stafford, v. Crosby*, 422

13. It is a sufficient ground to authorize a sale of an infant's property, that it is held in common with adults, and that the value of the estate is small, in comparison with the expense of a partition suit, to which it must otherwise be subjected. *In the matter of G. & E. Congdon, infants*, 566

14. Where property which was the only estate belonging to two infant children had been sold under a decree of foreclosure, for half its value, to satisfy a debt nearly equal to the amount of the bid, a re-sale was ordered upon security being given that the premises should produce fifty per cent. advance upon such re-sale, and that the interest on the whole purchase money should be paid to the purchaser, together with all the reasonable costs and expenses which he had paid in consequence of the purchase, or to which he had been subjected, either in opposing the application for a re-sale, or in investigating the title to the premises. *Dimes and others, trustees, v. Dodd and others*, 95

See DESCENT, 1, 2, 3, 4, 5, 6. DOWER, 1, 2, 3, 4, 5, 6. GUARDIAN AND WARD, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22. LUNATICS, 6, 7, 8, 9, 10, 12, 13, 14. PARTITION, 4. PRACTICE, 12, 13.

INFANTS' ESTATES.

See INFANT, 13, 14. GUARDIAN AND WARD 11, 12, 13, 14, 15. LUNATICS, 13, 14.

INJUNCTION.

1. Wherever the court of chancery has power to make an order in consequence of possessing jurisdiction over the subject matter of the suit or proceeding, and which person is bound to obey in consequence of his being either actually or constructively a party to the suit, it may enforce obedience

- to such order by the process of injunction founded upon a petition merely, although no bill has been filed against such person. *In the matter of Heming*, 317
2. The filing of the petition in such cases is a substitute for a bill, and is a substantial compliance with the statute, (2 R. S. 179, § 71.) *id.*
3. The provision of the statute prohibiting the issuing of an injunction until the bill is filed, relates only to those cases where the court obtains its jurisdiction of the cause in no other way than by a proceeding by bill. *id.*
4. Where the bill was dismissed by a vice chancellor, and an appeal was entered from that decree, but the subject matter of the suit was sold intermediate the entering of the decree and the appeal, the chancellor refused to grant an injunction against the purchaser, who was not a party to the suit, on petition; but permission was given to file a supplemental bill before the chancellor, and to move for an injunction thereon against the purchaser. *Bloomfield v. Snowden and others*, 355
5. It is not the practice to allow an injunction, affecting the rights of a party who has appeared, on an ex parte application to the court upon a supplemental bill; but regular notice of the application should be given to such party. *id.*
6. If a temporary injunction is necessary to prevent irreparable injury before regular notice of the application can be given for a general injunction, the court will grant an order to show cause, and allow such temporary injunction in the mean time; but the temporary injunction falls of course, if the order to show cause is not made absolute. *id.*
7. A master has no authority to allow an injunction, to stay proceedings at law after judgment, except upon the terms prescribed by the statute; and if the injunction has been issued without depositing the amount of the judgment, and giving the bond as required by the statute, it will be set aside for irregularity. *S. & J. F. Jenkins v. Wilder and others*, 394
8. If the suit at law is not at issue, the master should direct the provision directed by the 33d rule to be inserted in the injunction unless the injunction is founded on a mere bill of discovery. *id.*
9. If issue has been joined in a suit at law, the master should take the bond and security, as directed by the statute in such cases, and direct that it be filed with the proper officer before the issuing of the injunction. *id.*
10. Where there has been a verdict, the master should ascertain and direct the amount to be deposited; and if a judgment has been obtained, he should not only direct the amount of the judgment to be deposited, but should also take a bond and security to answer the damages and costs, in case the injunction should be dissolved. *id.*
11. None but the court, after verdict or judgment, can dispense with the actual deposit of the debt and costs, before the issuing of the injunction. *id.*
12. If the register or clerk discovers that the statute relative to injunctions has not been complied with by the injunction master, he should not issue the process without the special directions of the court. *id.*
13. Where the injunction may produce serious injury to the defendant, if the officer allowing the same neglects to take security from the complainant to pay such damages as may be sustained, the defendant may apply to the court for relief. *The Cayuga Bridge Co. v. Magee and others*, 116
14. It is no objection to an application to dissolve an injunction on bill and answer, that a replication has been filed. But if the testimony has been taken in the cause, the court will order the application to stand over until the hearing on the merits, unless special circumstances render delay improper. *Grandin and others v. Leroy and Smith*, 609
15. The breach of an injunction regularly issued is a contempt of the court; and in a proceeding against a party for such contempt, the court will not look into the merits of the cause in which the injunction issued. *The People v. Spalding*, 326
16. An officer out of court has no right to allow an injunction to stay proceedings under a decree. *Dyckman and M'Chain v. Kernochan and others*, 26

See ASSIGNMENT AND ASSIGNEE, 2. EXECUTORS AND ADMINISTRATORS, 18, 19. JURISDICTION OF CHANCERY, 18, 19, 33. PARTNERSHIP, 5. PLEADINGS, 12, 49. RECEIVER, 5, 6. REVIVOR, 6.

INTEREST.

1. Where upon a loan of money, a premium or profit beyond the legal rate of interest is either directly or indirectly secured to the lender, the loan will be usurious, unless it is attended by some contingent circumstances which subject the money lent to evident hazard. *Colton v. Dunham and Wadsworth*, 267

2. A mere nominal contingency, attended by no real hazard of the principal of the money lent, will not divest the transaction of its usurious character. *id.*

3. The ordinary risk of the death or insolvency of the borrower, is not such a hazard of the money lent as will authorize the lender to reserve a profit on the loan beyond the legal rate of interest. *id.*

4. If there is a negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending within the meaning of the statute against usury; and if a profit beyond the legal rate of interest is reserved or agreed to be paid, the contract is usurious. *id.*

5. Merchants can by agreement prescribe the mode of charging and crediting interest upon the several items in running accounts between them, provided the mode adopted is not intended to be and is not in fact a cover for usury. *Hart and others v. Dewey and others*, 207

6. In the absence of any agreement, a creditor receiving a partial payment of a debt has the right of applying it first to the satisfaction of the interest then due before it is applied to the discharge of any part of the principal. *id.*

7. In the absence of any agreement on the subject, a debt is presumed to be payable at the place where it was contracted, and where the creditor resides; and interest is to be computed according to the rate allowed by the laws in force at that place. *Stewart and others v. Ellice*, 604

See EXECUTORS AND ADMINISTRATORS, 16, 17.

INTERPLEADER, BILL OF.

See Costs, 20, 21, 22, 23, 24. PLEADINGS, PRACTICE, 56, 67, 68, 69.

INTOXICATION.

See DRUNKENNESS, 1. AGREEMENT, 5. DEED 1. INFANT, 12.

J

JOINTURE.

See DOWER, 1, 2, 3, 4, 5, 6.

JUDGMENT.

A judgment continues to be a lien on real estate, after the expiration of the ten years, as against the defendant in the judgment or his grantee without valuable consideration, but not as against bona fide purchasers or incumbrancers. *The Mohawk Bank v. R. and P. Atwater*, 84

See HEIRS AND DEVISEES, 1, 2, 4, 5, 6. INFANT, 12. LIEN, 1, 2, 3, 4, 5, 6, 7.

JURISDICTION OF CHANCERY.

1. After a defendant has answered a bill in chancery, and submitted himself to the jurisdiction of the court without objection, it is too late to insist that the complainant has a perfect remedy at law; unless the court of chancery is wholly incompetent to grant the relief sought by the bill. *Grandin and others v. Leroy and Smith*, 509

2. It seems the court of chancery cannot entertain a bill in the nature of a bill of review upon the ground of newly discovered facts, to review a decree which had been affirmed in the court for the correction of errors, unless such a right has been expressly reserved by the final decree of the appellate court. *Stafford v. Bryan*, 45

3. Where there is a conveyance of a farm, and a turnpike road passes across the farm, and the road is not excepted from the conveyance, the purchaser has no remedy in chancery for a compensation for the land covered by the road; his remedy, if any, is at law upon the covenant of seizin. *Diamond v. Sharts*, 183

4. The court of chancery has no general jurisdiction over its suitors to compel them to pay costs due to their solicitors, or counsel. *Lorillard v. Robinson and others*, 273

5. The proper remedy of the solicitor as

counsel to recover his bill of costs, is by an attorney; and wherever the complainant has action at law against the client. *id.*

6. The client may apply to the court for a perfect remedy at law, if the defendant raises the objection by demurrer to the bill, or insists upon it in his answer, the court will refuse to sustain the suit. *id.*

stay of the proceedings at law thereon, upon an undertaking to pay what shall be found due; and in such cases the court of chancery may compel the client to perform such undertaking. 15. The court, however, frequently decides upon the validity of a will of real estate, where the question arises collaterally; *id.* but in such cases, if the heir insists upon the invalidity of the will in his answer, an issue will be awarded to try the question at law. *id.*

7. But this court has no jurisdiction to order the taxation of the bill, as between solicitor and client, on the application of the solicitor himself, if there is no fund under the control of the court out of which payment can be made. 16. Where a deed is alleged to be a forgery, and has been improperly certified as duly proved and recorded, the court of chancery may take jurisdiction of the cause, for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits. But in such a case, it is proper to submit the question, as to the genuineness of the deed, to a jury under the direction of the court. *Apthorp and others v. Comstock and others*, 482

8. A bill to foreclose a mortgage given to secure the payment of \$600, at the expiration of two years from the date, with interest semi-annually, upon which, at the time of filing the bill and at the hearing, there was only \$12 due, for one year's interest, cannot be sustained, as the matter in controversy does not exceed the value of \$100. *Doue v. Sheldon and others*, 323

9. And the court could not entertain jurisdiction of the cause under the statute, although the master should report that the mortgaged premises were so situated that they could not be sold in parcels, and that the defendant was in possession and was insolvent. *id.*

10. Whether in such a case the court would sustain the bill, if the complainant had no other remedy, as where the whole amount of the money secured to be paid by the mortgage was less than \$100, and the defendant was in possession and insolvent, and the mortgage contained no power of sale, or there were subsequent incumbrancers? *Quære*. *id.*

11. The court of chancery has no original jurisdiction to try the validity of wills of personal estate. *Colton and others v. Ross and others*, 398

12. The jurisdiction of the court exists only in case of an appeal from the decision of the surrogate. *id.*

13. Where no appeal is made to the court of chancery, the probate of the will before the surrogate is final and conclusive, as to the personal estate. *id.*

14. The court of chancery has no jurisdiction to set aside a will of real estate, on the ground of the incompetency of the testator; and wherever the complainant has

id. a perfect remedy at law, if the defendant raises the objection by demurrer to the bill, or insists upon it in his answer, the court will refuse to sustain the suit. *id.*

15. The court, however, frequently decides upon the validity of a will of real estate, where the question arises collaterally; *id.* but in such cases, if the heir insists upon the invalidity of the will in his answer, an issue will be awarded to try the question at law. *id.*

16. Where a deed is alleged to be a forgery, and has been improperly certified as duly proved and recorded, the court of chancery may take jurisdiction of the cause, for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits. But in such a case, it is proper to submit the question, as to the genuineness of the deed, to a jury under the direction of the court. *Apthorp and others v. Comstock and others*, 482

17. Although the court of chancery in the exercise of a sound discretion may decide matters of fact, without the intervention of a jury; yet, if important rights are depending on mere questions of fact, it may be proper to award a feigned issue for the trial of such questions of fact. *id.*

18. Where a party is within the jurisdiction of the court, and the court acquires jurisdiction of his person, it may, although the subject matter of the suit is situated elsewhere, by injunction and attachment, compel him to desist from commencing a suit at law either in this state or in any foreign jurisdiction; and may also in the same manner compel him to execute a conveyance or a release in such form as is necessary to transfer the legal title to the property in question, according to the laws of the country where the same is situated, or as will be sufficient to bar an action in any foreign tribunal. *Mead v. Merritt & Peck*, 402

19. The court of chancery, however, will not by injunction restrain a suit or proceeding previously commenced in a court of a sister state, or in any of the federal courts. *id.*

20. Whether the court of chancery has power to direct the application of real property, situated without the jurisdiction of the court, in payment of a judgment recovered in one of the state courts? *Quære*. *Mitchell v. Bunch*, 608

21. The court, however, has jurisdiction to compel a debtor, who has been discharged from imprisonment for debt, to discover his property, in order that it may, by the order of the court, be applied in satisfaction of his debts. *id.*

22. Where the creditor can, by an imprisonment of the debtor, compel him to apply his property in payment of his debts, the court of chancery will not interfere. *id.*

23. If the person of the defendant is within the jurisdiction of the court, the court has jurisdiction as to his property, situated without such jurisdiction. *id.*

24. And the jurisdiction is exercised by compelling the defendant, either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or assignment thereof, as will be sufficient to vest in the grantee or assignee the legal title to, as well as the possession of the same, according to the laws of the place where the property is situated. *id.*

25. The court of chancery has jurisdiction to enforce the performance of contracts made in a foreign country; not only where the party proceeded against is domiciled here, but also where he is a foreigner, if he be within the jurisdiction of the court at the time of the service of process upon him. *id.*

26. Where one person conveyed land to another for the purpose of opening a street in the city of New York, and there was no other consideration for the conveyance but the benefit which the grantor was to derive from the opening of the street, and by subsequent events beyond the control of both parties the street could not be opened, a reconveyance of the land was decreed. *Quick v. Stuyvesant*, 84

27. If a deed or obligation is sought to be enforced in an event not foreseen or provided for by the parties, and contrary to their original intention, a court of equity will interfere to prevent such injustice. *id.*

28. In such a case the court of chancery will direct that to be done which the parties would themselves have directed had they foreseen the event. *id.*

29. Where, from any defect of the common law, want of foresight of the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to supply the defect or furnish the remedy. *id.*

30. But these principles, when acted on by the court of chancery, are subject to such limitations and restrictions as are necessary to protect the rights of bona fide purchasers and others who have superior equities. *id.*

31. The court of chancery will not entertain jurisdiction of a cause, upon the ground that the complainant, by mistake, interposed a plea in a suit at law, which did not cover his defence to such suit; where by the ordinary practice of the court in which such suit was pending, he would have been permitted to amend. *Graham v. Stagg*, 321

32. Although the same facts which will in equity discharge a surety, on a simple contract, may be pleaded as a defence to an action against him in a court of law; yet as the court of chancery had originally the exclusive jurisdiction in such cases, it will not relinquish its jurisdiction because the complainant may now have an adequate remedy at law. *Sailly v. Elmore*, 497

33. But if a suit at law has been commenced, and the defendant in that suit unnecessarily files a bill in chancery to set up a defence of which he might avail himself at law, the court may refuse to interfere by way of preliminary injunction; or it may refuse costs to the complainant on the final decree. *id.*

See AGREEMENT, 1. ASSIGNMENT AND ASSIGNEE, 6. COSTS, 1, 2. EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 18, 19, 20, 21. FRAUD, 2, 3, 9. GUARDIAN AND WARD, 1. HUSBAND AND WIFE, 17, 19, 20, 21, 22. LUNATICS, 6, 11, 13, 14. MASTER'S SALE & PARTITION, 9, 10, 11, 12. SET-OFF.

L

LEASE.

See COVENANT. MORTGAGE, 10.

LEGACY.

1. Where specific chattels not necessarily consumed in the use are bequeathed for life with a limitation over, the practice is to require from the first taker an inventory of the goods, specifying that they belong to him for the particular period only, and afterwards to the person in remainder. And security is not required from the first taker, unless there is danger that the articles will be wasted or otherwise lost to the remain

derman. Covenhoven and others v. Shuler and others,

123

ably executed, a court of chancery will enforce the lien of the judgment as against such title. *id.*

2. If there is a general bequest of a residue for life with remainder over, although it includes articles which are consumed in the using, the whole must be sold and converted into money, and the proceeds invested; and the interest only is to be paid to the legatee for life. *id.*

3. Where land is devised subject to the payment of legacies, and the devisee dies before payment, the legatees have a specific lien upon the income of the land after his death, as well as upon the land itself, and their legacies must be paid out of the same in preference to the creditors and legatees of such devisee. *Hallett and Davis v. Hallett and others, executors,*

15

4. If the estate and the income which accrued after the death of the devisee should prove insufficient for the payment of the legacies, the balance, to the extent of the rents and profits received by the devisee in his life time, will constitute a debt against the residue of his estate, to be paid in a due course of administration. *id.*

5. Where the legatees seek a sale of the estate to satisfy the legacies charged thereon, the devisee or his heirs cannot require them to litigate a claim of third persons which, if valid, is paramount to the title under the will of the deviser. *id.*

6. In such cases, the right acquired under the will, whatever it may be, must be sold subject to all paramount claims. *id.*

See EXECUTORS AND ADMINISTRATORS, 13. GUARDIAN AND WARD, 4. LIMITATIONS, 2. PARTIES, 12, 14. PRACTICE, 70, 71, 72.

LIEN.

1. A judgment, as soon as it is docketed, becomes at law a general lien on all the real estate of the debtor, not only as against himself, but also as against all other persons deriving title through or under him, subsequent to such judgment. *Morris and others v. Monatt and others,*

586

2. The lien, however, may, in some cases, be displaced by the execution of a power which overreaches the judgment. *id.*

3. But if a purchaser, acquiring a title under the execution of such power, has notice that the power is improperly or inequit-

4. So the lien of the judgment may be removed by a decree of the court of chancery where the judgment debtor holds the legal estate in the land merely as a naked trustee for another, or where there is a subsisting equitable claim against the premises, which is prior in point of time to the lien of the judgment. *id.*

5. In chancery, the general lien of a judgment is controlled by equity so as to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof. *White v. Carpenter and others,*

217

6. A party who has a specific equitable lien on real property, or the proceeds thereof, is entitled to a preference over the general lien of a creditor under a subsequent judgment. *id.*

7. Where L., being entitled to one undivided third part of his father's estate, exchanged with W. one half of his interest in said estate for some Virginia lands; and L. conveyed to S. all his interest in his father's estate, in trust to pay W. \$3000 out of the proceeds thereof in full satisfaction for the Virginia lands, and if any more was realized out of said estate, the surplus was to be retained by S. as a compensation for his services; and S. afterwards failed, and W. filed a bill for the payment of the \$3000, or that L.'s estate might be sold to pay the same; and L. then, with the consent of W., conveyed said estate to M. in trust to sell the same, and in the first place to pay W. his said demand of \$3000, and then to pay the residue to certain creditors named in a schedule, provided such creditors released their claims against S. by the 1st May thereafter; and in case any of such creditors refused to execute releases, their share of the residue was to be paid to S. or to his assigns; three of the creditors named in the schedule having neglected to comply with the condition, S., on the 18th May, 1818, conveyed to H. all the interest intended for those creditors; H. was afterwards discharged under the insolvent act, and his assignees conveyed all his interest in the property to E.; after the conveyance from L. to S., and before the execution of the trust deed to M., P. F. recovered a judgment against S. in the supreme court; in May, 1822, E. purchased this judgment for \$328, the amount then due thereon; and at the time of the purchase, S. gave his note to

E. for the whole or a part of the judgment, and E. agreed that if the note was paid, the judgment should only be enforced against the property conveyed in trust to M.; E. afterwards sold under the judgment all the right of S. in the estate so conveyed to M., and purchased the same himself for \$25; at the sale W. gave notice of his claim for \$3000 upon the estate; it was held, that the judgment of P. F. only attached upon the interest S. had in the real estate of L. after satisfying W.'s debt; and as E. had notice of W.'s claim previous to the sale under the judgment, the only effect of such sale was to turn E.'s general lien upon the surplus into a specific lien, to the extent of his bid.

See HEIRS AND DEVISEES, 1, 4, 5, 6, 7. JUDGMENT, 1. LEGACY, 3. MORTGAGE, 5. PARTNERSHIP, 6. VENDOR AND PURCHASER, 1, 3.

LIMITATIONS, STATUTE OF.

1. To revive a debt barred by the statute of limitations, there must be an admission of a subsisting indebtedness, unaccompanied by anything which shows the intention of the party to avail himself of the statute as a bar, or which is sufficient to rebut the implication of a promise to pay. *Stafford v. Bryan*, 45

2. The statute of limitations may be interposed against legacies, if not charged upon the land, as well in equity as at law. *Souzer and wife v. De Meyer and De Meyer*, 574

LOAN

See AGREEMENT, 4.

LUNATICS.

1. A committee must be appointed in this state for a non-resident lunatic to enable him to obtain the control of property here. *In the matter of E. Pettit, a lunatic*, 174

2. And a commission may issue to ascertain the lunacy of a non-resident; but it cannot be executed beyond the limits of this state. *id.*

3. Commissioners may be required to give the lunatic due notice of the time and place of executing a commission of lunacy, although the lunatic resides out of the state. *id.*

4. The chancellor has no authority to or-

der the sale of the real estate of a lunatic, unless it be necessary for the payment of the lunatic's debts, or for the maintenance of himself or of his family, or for the education of his children. *In the matter of Pettit, a lunatic*, 596

5. And in neither of these cases can it be done if there is sufficient personal estate for that purpose. *id.*

6. The statute gives the court of chancery the exclusive care and custody of the persons and estates of idiots, lunatics, and habitual drunkards; and all contracts made by them, and all gifts of their property or effects, after the actual finding of an inquisition declaring their incompetence, are actually void. *L'Amoureux, committee of Stafford, v. Crosby*, 423

7. The inquisition is only prima facie evidence of the invalidity of an act done by the lunatic or drunkard before the issuing of the commission, but which is overreached by the finding of the jury. *id.*

8. It is a contempt of the court for a person to interfere with the property of a lunatic, &c., after he is informed of the institution of proceedings to declare his incompetency. *id.*

9. After the finding of an inquisition declaring the incompetency of the lunatic, &c., the proper remedy of creditors is by an application to the court, by petition, for the payment of their debts, if the committee decline discharging them without the direction of the court; and if their demands are disputed or doubtful, it may be referred to a master to ascertain whether they are equitably due. *id.*

10. It is not proper to subject the estate of the lunatic, &c., to the expense of a proceeding by bill against his committee, except by the direction of the court; and it is a contempt of the court to commence a suit at law without its permission. *id.*

11. The statute having given to the court of chancery the exclusive jurisdiction in such cases, and charged it with the duty of providing for the payment of the debts of the idiot, lunatic, or drunkard, out of his estate, the chancellor will see that the legal and equitable rights of the creditors are protected and enforced; but this must be done according to the usual forms of proceedings in this court, or under its direction. *id.* 423

12. Courts never enforce executory con-

tracts against infants or lunatics, except such contracts as are for necessities furnished. *Loomis & Hayden v. Spencer & Rolph*, 153

13. But where an infant or lunatic has received the benefit of property sold to him in good faith, by a party who had no knowledge of his incapacity to contract, and where no advantage has been taken of his situation, a court of equity will not interfere to set aside the contract. *id.*

14. Where the creditor of a lunatic, on the sale of property to the latter in good faith, has obtained a legal security, the court of chancery will not deprive him of such security without restoring to him so much as the estate of the lunatic has been actually benefited by the sale. *id.*

See GUARDIAN AND WARD, 17, 18, 19.

M

MARRIAGE.

See HUSBAND AND WIFE, 18, 19.

MASTER'S OFFICE

See CONTEMPT, 1, 2. EXECUTORS AND ADMINISTRATORS, 18, 19. INJUNCTION, 7, 8, 9, 10, 16. MORTGAGE, 6, 7, 8. PARTITION, 6. PRACTICE, 20, 35, 36, 39, 40, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66.

MASTER'S SALE.

1. Where the master, who was directed to sell mortgaged premises under a decree, had written instructions from the complainant's solicitor not to sell the premises for a less sum than \$2800, the amount of the debt and costs, but through ignorance of his duty the premises were sold for \$1000 less, to purchasers who were informed of the instructions at the time of the sale, and before they paid their bid, the court ordered a resale of the property. *Requa v. Rea and wife*, 339

2. Where the purchasers took possession of the property and made improvements thereon, after being informed by the master that the facts would be submitted to the court, and without waiting for the confirmation of the report of sale, it was held, that they were not entitled to indemnity for such improvements. *id.*

3. Where a person becomes a purchaser under a decree of the court of chancery, he submits himself to the jurisdiction of the court in the suit in which the decree was made, as to all matters connected with the sale, or relating to him in the character of purchaser. *id.*

4. A purchaser at a master's sale is bound to complete the purchase where the vendor shows a prima facie title, against which there are no reasonable grounds of suspicion. *In the matter of Thomas Browning*, 64

5. If it appears that any person is making a claim adverse to the title of the vendor, or that there are probable grounds for supposing such a claim will be made, the court will direct the testimony of the witnesses to be perpetuated. *id.*

6. Where a purchaser at a master's sale purchases under the assurance at the time that he is to receive a perfect title, if such title cannot be given he will not be compelled to complete the purchase. *Morris others v. Mowatt and others*, 586

7. Neither can he be compelled to receive a good legal title, if it is liable to be litigated in consequence of some valid equitable claim which may be brought against it. *id.*

8. He is not obliged to accept a mere equitable title, or a doubtful title. *id.*

9. He has a right to require, under such circumstances, a title which is good both at law and in equity.

10. The biddings at a master's sale will not be opened except in very special cases, and then it will not be done unless the purchaser is fully and liberally indemnified for all damages, costs and expenses to which he has been subjected. *Duncan and others and Trustees, v. Dodd and others*, 99

See INFANT, 14. MORTGAGE, 1, 6, 7, 8. RE VIVOR, 22.

MERCHANTS.

See INTEREST, 5.

MESNE PROFITS.

See DOWER, 7, 8, 9, 10.

MORTGAGE.

1. Where lands belonging to several persons are covered by a mortgage given by the person from whom they derive their titles, the several parcels must be sold to satisfy the mortgage in the inverse order of their alienation. *Gouverneur v. Lynch*, 300
 2. The first purchaser from the mortgagor has the prior equity, although the consideration was not actually paid until after other portions of the lands had been purchased and paid for. *id.*
 3. If a vendee is in possession of lands, under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity. *id.*
 4. If the purchase money has been paid by a vendee before a subsequent mortgage is recorded, the mortgagee will have no claim upon the land. *id.*
 5. If a part of the purchase money remains unpaid at the time the mortgage is recorded, such mortgagee will have an equitable lien on the land to the extent of the unpaid purchase money. *id.*
 6. Where only a part of the mortgage debt is due, a decree for a sale will not be ordered until a reference has been made to a master and he has reported as to the situation of the mortgaged premises. *The Ontario Bank v. Strong and others*, 301
 7. If the master upon such reference reports that a sale of the whole premises is necessary, he should give the reasons upon which his opinion is founded. *id.*
 8. If he decides that the property may be sold in parcels, he should state in his report the relative situation and value of the several parcels, and what part of the premises ought to be first sold, and all other facts necessary to enable the court to make such order of sale as will be most beneficial to the parties. *id.*
 9. Where either real or personal estate upon which there is an outstanding mortgage, is turned into money, the rights of the mortgagee continue unaltered, and the court will direct the application of the money according to the rights of the parties as they existed previous to the alteration of the estate. *Astor v. Miller and others*, 68
 10. A mortgagee of leasehold premises who has never been in possession, or in the receipt of the profits of the estate, is not liable to an action upon the covenant contained in the lease as the assignee thereof. *id.*
 11. A mortgagee out of possession has, both at law and equity, only a chattel interest in the mortgaged premises; and the mortgagor, for every substantial purpose, is the real owner. *id.*
 12. If a mortgage while in the hands of the mortgagee is not a valid lien on the property, it will not be valid in the hands of the assignee of such mortgagee. *Pedington and wife v. Fay and others*, 302
 13. Before foreclosure, a mortgagee cannot maintain ejectment to recover possession of the mortgaged premises, and he has no interest in such premises which can be sold on execution; and before an entry under his mortgage, he is not bound by a covenant running with the land, as an assignee of the mortgagor. *Morris and others v. Morrell and others*, 586
- See HEIRS AND DEVISEES, 7. INFANT, 5, 6, 7, 8, 9, 13, 14. JURISDICTION OF CHANCERY, 8, 9, 10. MASTER'S SALE, 1, 2. PLEDINGS, 4.

N

NE EXEAT REPUBLICA.

1. A writ of ne exeat is now resorted to merely for the purpose of obtaining equitable bail. *Mitchell v. Bunch*, 64
2. Whenever the defendant intends leaving the state, the complainant, upon producing evidence of such intention, and of his equitable claims against him, has a right to this equitable bail. *id.*
3. It is a matter of course to discharge a ne exeat, upon the party's giving security to answer the complainant's bill, where a discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself answerable to the process of the court which may be issued to enforce its performance. *id.*
4. As a general rule, a ne exeat is issued only for an equitable demand. *id.*
5. But in case of a bill filed for an account, it may be granted, although the defendant might have been arrested at law, this being a case where the courts of chancery

every and law have a concurrent jurisdiction.

id.

6. A ne exeat may be granted in a suit between foreigners, and in respect to demands arising abroad.

id.

7. But where a judgment debtor has been sued upon the judgment, in the circuit court of the United States, sitting within the state, and held to bail in such suit, and a bill has also been filed against him in the court of chancery, to obtain the payment of such judgment, and a ne exeat issued thereon against the defendant, the ne exeat will be discharged, unless the complainant elects to release the defendant from his arrest and bail in the circuit court of the United States.

id. 607

the sale on the ground of fraud upon the part of the vendee. *Livingston v. The Peru Iron Co. and others*, 390

4. If the vendor makes a subsequent conveyance, while the fraudulent vendee is in actual possession claiming the land under his prior purchase, the subsequent conveyance is inoperative; and a suit to set aside the first sale must be brought in the name of the vendor, or of his legal representatives if he is dead. *id.*

5. No persons are parties as defendants in a bill in chancery, except those against whom process is prayed, or who are specifically named and described as defendants in the bill. *Verplanck and others v. The Mercantile Insurance Co. of N. Y. and J. Barker*, 438

6. Where there was no prayer of process against a corporation by its corporate name, but only against the officers thereof, and the corporation was not described in the bill as being a party thereto, *held*, that the corporation was not before the court as a party to the suit. *id.*

7. Where a debtor failed and conveyed all his property to assignees, in trust to pay certain specified debts, and to divide the surplus or so much thereof as should be necessary among such of his other creditors as should come in under the assignment and release him from their debts, and to re-assign the residue to the debtor, and a number of the creditors came in under the assignment and complied with the condition, *it was held*, that the debtor could not file a bill against his assignees, for an account of the trust property, without making the creditors who came in under the assignment, and those whose debts were specially provided for and which remained unpaid, parties to the suit. *Mitchell v. Lenox and Taylor*, 280

8. A person is a necessary party to a suit when no decree in relation to the subject matter of litigation can be made until he is properly before the court as a party; or where the defendants in the suit have such an interest in having such person before the court as would enable them to make the objection if he were not a party. *Bailey v. Inglee and others*, 278

9. A defendant may in some cases be a proper party to a suit, although he is not a necessary party; as in the case of a fraudulent assignment of a trust fund, where the cestui que trust may at his election either proceed against the trustee alone, or may

NEW TRIAL.

See PRACTICE.

NEXT FRIEND.

See GUARDIAN AND WARD, 1, 2, 3, 4. HUSBAND AND WIFE, 12, 13, 14, 15. INFANT, 1, 2, 3, 4.

NOTICE.

A purchaser, wherever he has sufficient information to put him on inquiry, in equity, is considered as having notice; and in such a case he will not be deemed a bona fide purchaser. *Pendleton and wife v. Fay and others*, 202

See MORTGAGE, 3.

P

PARTIES.

1. Where there is an absolute assignment of a chose in action, and the assignor claims no interest therein, he is not a necessary party to a bill filed to recover the amount due. *Ward v. Van Bokkelen and others*, 289

2. The assignee of a chose in action is now considered the real party to the suit, as well at law as in equity; and the defendant may plead and give in evidence any matter of defence which exists in his favor against the assignee. *id.*

3. Where the vendor is dead, all his heirs at law should be parties to a bill to set aside

the sale on the ground of fraud upon the part of the vendee. *Livingston v. The Peru Iron Co. and others*, 390

join the fraudulent assignee in the same bill. *id.* by bill, the complainant must take out and serve a subpoena as in ordinary suits. *id.*

10. The rule that all persons materially interested in the subject matter of the litigation should be made parties to the suit, may be dispensed with when it becomes extremely difficult or inconvenient. *Hallett and Davis v. Hallett and others*, 15

11. But it cannot be dispensed with where the rights of persons not before the court are so inseparably connected with the claims of the parties litigant that no decree can be made without impairing the rights of the former. *id.*

12. Where there are many persons having claims on a fund, and the shares of a part cannot be determined until the rights of all the others are settled and ascertained, as in the case of residuary legatees, or creditors of an insolvent estate, all must be made parties; or they must have an opportunity of coming in and substantiating their claims before any distribution of the fund can be made. *id.*

13. In such cases, if the fund is in court or under the exclusive control of the parties actually before the court, it will be sufficient for any of the parties having a separate claim upon the fund, to file a bill in behalf of themselves and all others who may elect to come in under the decree. *id.*

14. It seems that one residuary legatee may file a bill in behalf of himself and all others standing in the same situation, and that it is not necessary to make them all actual parties to the suit. *id.*

See COSTS, 19. PRACTICE, 70, 71.

PARTITION.

1. Where partition suits were pending at the time the revised statutes went into operation, the subsequent proceedings therein must conform to such statutes. *Larkin v. Mann and others*,

2. Partition suits in this court may be commenced either by bill or petition, and the course of practice prescribed by the revised statutes in relation to proceedings in the common law courts must be adopted here, as far as is practicable, except in cases where a different course of practice is authorized or prescribed by law. *id.*

3. If the suit is commenced in this court

4. No proceedings can be had against an infant after service of the subpoena, until a guardian has been appointed, and has filed the requisite security. *id.*

5. Where the right of the complainant is not admitted by the answer, he is bound to make such proof of his title as would entitle him to a recovery in ejectment. *id.*

6. If the bill is taken as confessed, the proof of the complainant's title may be made before a master, on a reference. But if an issue of facts is joined in the cause, the complainant may make the necessary proof, and produce the abstract of the conveyances before the examiner. *id.*

7. The court may in its discretion award a feigned issue to try the question of title, as in ordinary cases in this court. *id.*

8. In chancery it is not necessary that the shares assigned to the several parties should be exactly equal; as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who receive less. *id.*

9. A party who has merely a future contingent interest in an undivided share of real estate cannot sustain a suit for a partition of the property. *G. H. & E. Striker v. Mott and others*, 387

10. A mere reversioner, without the concurrence of any of the owners of the present interest in the premises, has no right to file a bill for partition. *id.*

11. But a reversioner is a necessary party, where a bill is filed by a person who is owner of an undivided share of the reversion as well as of an undivided share of the present interest in the property. *id.*

12. The reversioner is also a necessary party, where the suit is brought by the owner of an undivided share of the premises for life, or of any other particular estate in the same, and some of the other parties own the residue of the premises. *id.*

See GUARDIAN AND WARD 9, 13, 15.

PARTNERSHIP.

1. As a general rule, each one of the members of a copartnership has an equal

right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm. *Law v. Ford*, 310

2. Where either partner has a right to dissolve the partnership, and the articles of copartnership do not provide for the settlement of the concern, upon a bill filed for that purpose by one of the partners, the appointment of a receiver is a matter of course. *id.*

3. In such case the court will direct the receiver to apply the partnership funds to the payment of all the debts of the firm, rateably, without giving any preference to the favorite creditors of either partner. *id.*

4. The creditors of a partnership have an equitable right to payment out of the partnership effects, in preference to the creditors of the individual partners. *Deveau v. Fowler*, 400

5. Where, on the dissolution of a copartnership existing between D. and F., D. agreed with F. that F. should take all the stock and effects, and pay all the debts due by the firm, and afterwards F. became insolvent and threatened to dispose of all the partnership property, and appropriate the same to his own individual use, leaving the debts unpaid; upon a bill filed for that purpose, an injunction was granted, restraining F. from disposing of the partnership property in a different manner from that stipulated in his agreement with D. *id.*

6. Where the administrator of a deceased partner assigned all his interest in the partnership effects to the survivor, under an agreement that the latter should discharge all the debts of the firm, *it was held*, that this assignment and agreement did not destroy the lien or equity which existed in favor of each partner, on the dissolution, to have the partnership property applied to the payment of the partnership debts. *id.*

See DEBTOR AND CREDITOR, 5.

PATENTS

1. If the specification annexed to a patent is sufficiently explicit to enable a skilful mechanist without any other aid to construct the patented invention, the patent will not be void although some of the minor details of the machine should not be set forth at large. *Burrall v. Jewett*, 134

2. But the patent is void if the machine will not answer the purpose for which it was intended without some addition, adjustment or alteration which had not been discovered or invented at the time the patent was issued. *id.*

3. Where a patent is granted for an improvement in machinery, a drawing of the improvement as well as a specification is required. *id.*

4. The drawing may be referred to for the purpose of aiding a specification, which otherwise would be imperfect. *id.*

5. It may also be referred to as evidence to show that the machine claimed under the patent is not the one for which the patent issued. *id.*

See ASSIGNMENT AND ASSIGNEE, 6. COURTS, CIR. U. S. 1, 2, 3.

PAYMENT, ANTECEDENT DEBT.

See BILLS OF EXCHANGE AND PROMISSOR NOTES. FRAUD, 5

PLEA.

See PLEADINGS.

PLEADINGS.

- I. *Bill.*
- II. *Demurrer.*
- III. *Plea.*
- IV. *Answer.*
- V. *Replication and issue.*

PLEADINGS I.

Bill.

1. To sustain a bill of discovery filed in aid of a defence at law, the complainant must show in his bill that the discovery prayed for is material to his defence at law; and also, that his defence at law cannot be established by the testimony of witnesses, or without the aid of the discovery which he seeks. *Leggett v. Postley*, 599

2. A discovery will not be allowed merely to guard against anticipated perjury in a suit at law. *id.*

3. A bill of interpleader, strictly so called, is where the complainant claims no relief against either of the defendants, but only

- asks for leave to pay the money or deliver the property to the one to whom it of right belongs, and that he may thereafter be protected from the claims of both. *Bedell v. Hoffman and others*, 199
4. But a bill in the nature of a bill of interpleader may be filed to redeem, and be let into possession of mortgaged premises. *id.*
5. The object of a bill of interpleader is to protect a complainant standing in the situation of an innocent stake holder, and where a recovery against him by one claimant of the fund might not protect him against a recovery by another claimant. *Badeau v. Rogers & Secord*, 209
6. It is not necessary to file a bill of interpleader where the holder of the fund is already a party to a suit in chancery, brought by one claimant against the other to settle the right to the fund in his hands. *id.*
7. In such a case the holder of the fund should apply by petition in that suit for leave to pay the fund into court to abide the event of the litigation between the other parties. *id.*
8. If a defendant permits a bill of interpleader to be taken as confessed against him, it is an admission that as to him the bill was properly filed, and that he has made an improper claim upon the fund. *id.*
9. Bills of interpleader should not be filed except in cases where the complainant can in no other way be protected from an unjust litigation in which he has no interest. *Bedell v. Hoffman and others*, 199
10. Where an original bill was properly filed by a creditor to reach the property of the defendant after the return of an execution unsatisfied, *held*, that a supplemental bill was proper to reach subsequently acquired property to satisfy the same debt. *Bager and others v. Price and others*, 333
11. The court will not permit a party to file two original bills, and carry on two suits at the same time against the defendant to satisfy the same debt. *id.*
12. An original bill cannot be sustained either by the parties or privies to a former suit for an injunction to restrain proceedings under a decree in such suit. *Dyckman and McChain v. Kernochan and others*, 26
13. Bill may be framed with a double aspect, where it is doubtful what relief the complainant is entitled to on the facts of his case. *Colton and others v. Ross and others*, 396
14. In such case the relief prayed for may be in the alternative; but it must be consistent with the case made by the bill. *id.*
15. Where the case made by the bill entitles the complainant to one of two kinds of relief, but not to both, the prayer should be in the disjunctive. *id.*
16. So, if it be doubtful whether the facts of the case entitle him to the specific relief prayed for, or to relief in some other form, his prayer concluding for general relief should be in the disjunctive. *id.*
17. In such case, although the complainant should not be entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief, consistent with the case made by the bill. *id.*
18. But where the complainant prays for particular relief, and for other relief in addition thereto, he can have no relief inconsistent with such particular relief, although it should be founded upon the bill. *id.*
19. Where the surviving complainant is insolvent, the defendant who had demands against the deceased and surviving complainants jointly, will be permitted to file a cross bill in the nature of an original bill, against the surviving complainant and the personal representatives of the deceased complainant, and the proceedings in the original suit will be stayed until the cross suit is in readiness for a hearing. *Brown and others v. Story*, 594
- See ASSIGNMENT AND ASSIGNEE, 2. COSTS, 3, 4, 20, 21, 22, 23, 24. DEBTOR AND CREDITOR, 7, 8. EXECUTORS AND ADMINISTRATORS, 20, 21. HEIRS AND DEVISEES, 3. HUSBAND AND WIFE, 7, 8, 9, 12, 13, 14. INJUNCTION, 4. LUNATICS, 10. PARTIES, PARTITION, 9, 10, 11, 12. REVIVOR, 10, 11, 12, 13. STALE DEMANDS, 1.
- PLEADINGS II.
- Demurrer.
20. In a suit for a specific performance of a contract in relation to land, if the bill states that an agreement was made, on demurrer to the bill, the contract will be presumed to have been reduced to writing and signed by the parties, or their agents,

unless the contrary appears. *Cozine v. Graham and Bleecker*, 177 or the defendant will be permitted to insist upon the same matters in his answer. *id.*

21. If the agreement, however, appears in the bill to have been a parol agreement, and no facts are alleged to take the case out of the statute, the defendant may demur to the bill. *id.*

See HUSBAND AND WIFE, 13. POST. 35.

PLEADINGS III.

Plea.

22. A defendant cannot plead and answer, or plead and demur, as to the same matter. *Bouzer and wife v. De Meyer & De Meyer*, 574

23. If he answers as to those matters which by his plea he has declined to answer, he overrules the plea. *id.*

24. So if a plea and demurrer are to the same part of the bill, the demurrer is overruled. *id.*

25. If the defendant is willing to give the discovery sought by the bill, and has a defence which might be pleaded in bar, he will have the full benefit of such defence, if he sets it up, and insists upon it in his answer. *id.*

27. Where the complainant sets up equitable circumstances in his bill, in anticipation of a plea and to defeat the same, the defendant must support his plea by an answer as to those equitable circumstances, in addition to the general denial thereof in the plea. *id.*

28. If the answer admits, or does not fully deny such equitable circumstances, they may be used on the argument to falsify the plea. *id.*

29. And if they are denied by the plea and the answer, the complainant may take issue on the plea, and prove the same. *id.*

30. If the plea is falsified by the proofs, the complainant will be permitted to examine the defendant on interrogatories, if a discovery is necessary. *id.*

31. If a plea is bad in form only, but good in substance, as to the whole or any part of the relief sought by the bill, and was not put in in bad faith, it will be permitted to stand as a part of the defendant's answer.

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32. A plea will be overruled if it does not set forth any new matter, although the objection raised by it would have been valid if it had been urged by way of demurrer to the bill. *Cozine v. Graham and Bleecker*, 178

33. The mere pendency of a suit in a foreign court, or in a court of the United States, cannot be pleaded in abatement, or in bar to a suit for the same cause, in a state court. *Mitchell v. Bunch*, 606

34. Where the complainant has omitted to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, the proper mode of taking advantage of it is by plea or answer. *Mitchell v. Lennox and Taylor*, 280

35. But if the objection appears on the face of the bill, the defendants may demur. *id.*

See HUSBAND AND WIFE, 11. PRACTICE, 50, 51.

PLEADINGS IV.

Answer.

36. A defendant cannot be compelled to answer a charge in the complainant's bill which if true would subject him to an indictment or a criminal prosecution. *Leggett v. Postley*, 599

37. Where one of the defendants in a bill of interpleader, by his answer, makes a claim against the complainant beyond the amount admitted to be due and paid into court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand which is not in controversy with the other defendants. *The President, Directors & Co. of the City Bank v. Bangs and others*, 570

38. Where a plea to the bill has been overruled on the merits, the same matter cannot be set up in the answer as a bar to the suit, without the special permission of the court. *Townsend v. Townsend*, 418

39. In a suit for a specific performance of a contract in relation to land, if the defendant in his answer admits the agreement, and does not afterwards insist upon the

statute of frauds as a bar, he cannot make the objection; and no proof of the agreement will be necessary. *Coxine v. Graham and Bleecker*, 177

40. If the objection that the contract was not in writing does not appear upon the face of the bill, the defendant must either plead that fact in bar, or insist upon it by way of defence in his answer. *id.*

41. Where the defendant in his answer denies all knowledge of a fact charged in the bill, but admits his belief as to the fact charged, it is not necessary for him to deny any information on the subject. *Davis and Brooks v. Mayes and others*, 105

42. The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or is necessary to substantiate his proceedings and make them regular. *id.*

43. The defendant must answer as to all facts within his knowledge, or which he can ascertain from an inspection of books and papers in his possession or under his control. *id.*

44. If the further answer which is called for by the complainant's exceptions can be of no possible use to him, the first answer is sufficient, and the exceptions cannot be sustained. *id.*

45. As a general rule, if the charge in the bill embraces several particulars, the answer should be in the disjunctive denying each particular; or admitting some and denying the others, according to the fact. *id.*

46. Where, in a suit against 12 defendants, an answer was put in and filed, purporting to be the joint and several answer of all, but was in fact not signed or sworn to by one of the defendants, and after a replication was filed, proofs taken, the cause set down for hearing, a motion for re-examination of a witness, a denial of the same, an appeal from such decision, and a motion for leave to file a supplemental answer, a separate answer was filed without leave of the court by the defendant who had not joined in the original answer, setting forth substantially the same defences asked to be allowed to be set forth in the supplemental answer; it was held, that the separate answer was filed irregularly, and it was directed to be taken off the files of the court. *The Fulton Bank v. Beach and others*, 307

47. It seems that where the parties agree that an answer may be put in without oath or signature, it is of course for the court so to order. *id.*

48. An answer should regularly be signed and sworn to, but the signature and oath may be waived by the complainant, and the filing of a replication is evidence of such waiver. *id.*

49. Although a jurat to an answer is not in the precise form prescribed by the rules, yet if the answer is retained by the complainant five months without objection, the informality cannot be urged by him as a ground for refusing a motion to dissolve an injunction; especially where the jurat would be deemed sufficient upon an indictment against the defendant for perjury. *Graham v. Stagg*, 321

50. The titles of further answer must correspond with the order under which they are put in. *The Bennington Iron Co. and others v. Campbell and others*, 160

51. It is improper to incorporate in an answer to an amended bill the whole matter of the former answer. *id.* 159

ANTE, 26, 27, 28, 31. See also COSTS, 13, 14
HUSBAND AND WIFE, 15.

PLEADINGS V.

Replication and issue.

52. Where the complainant replies to a plea, he admits its sufficiency; and if the truth of the plea is established the bill will be dismissed. *Dows and others v. M'Michael*, 345

53. If the defendants, or either of them, deny the allegations in a bill of interpleader, or set up distinct facts in bar of the suit, the complainant must reply to the answer, and close the proofs in the usual manner, before he can bring his cause to a hearing. *The President, Directors and Co. of the City Bank v. Bangs and others*, 579

54. But where the defendants admit the facts stated in the bill, and on which the right to file the bill of interpleader rests, and set up no new facts, as against the complainant, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the cause down for a decree to interplead, without waiting until the proofs are taken as between the defendants. *id.*

POWER.

See EXECUTORS AND ADMINISTRATORS, 10, 11,
12, 13. LAEN, 2, 3. WILL, 7.

PRACTICE.

- I. *Filing bill, supplemental bill, cross bill, and process.*
- II. *Appearance.*
- III. *Motions, orders, affidavits, putting in answer and demurrer.*
- IV. *Amending and dismissing bill, and taking the bill pro confesso.*
- V. *Production and inspection of books, &c., taking testimony, feigned issue, new trial.*
- VI. *Hearing and re-hearing.*
- VII. *Reference to master, exceptions to answer.*
- VIII. *Decree.*
- IX. *Appeals from Vice Chancellor; reference of motions and causes to a Vice Chancellor, and removal of causes from a Vice Chancellor to the Chancellor.*

PRACTICE I.

Filing bill, supplemental bill, cross bill, and process.

1. A supplemental bill cannot be filed without a previous order of the court giving permission; but such order may be granted on an ex parte application. *Eager and others v. Price and others*, 333

2. Where an injunction is asked for on a supplemental bill, a copy of the bill is usually served on the party, if he has appeared in the cause, together with a notice of the application; and if the court makes an order for the injunction, leave to file the bill is necessarily implied in such order. *id.*

3. On an ex parte application to file a supplemental bill, the court only examines the question so far as to see that the privilege is not abused for the purpose of delay and vexation to the defendant. *id.*

4. In a doubtful case, the court may direct notice of the application to be given to the defendants who have appeared. *id.*

5. In no case is the complainant in the original suit compelled to stay proceedings therein, upon the filing of a cross bill, except by a special order of the court. *White v. Buloid and others*, 164

6. If the complainant in the cross bill wishes to stay proceedings in the original

suit, the cross bill should be filed on oath, and a certificate of counsel should be obtained, stating that he believes a stay of proceedings in the original suit to be necessary for the attainment of justice in the cause, and that the cross bill is not intended for delay. *id.*

7. Notice of the application for an order to stay the proceedings in the original cause should be given to the adverse party. *id.*

8. It is not a matter of course to stay the proceedings in the original suit in any case, unless the defendant in the cross bill is in contempt for not answering. *id.*

9. If the cross bill is not filed before or at the time of answering in the original suit, the delay must be accounted for, or the proceedings will not be stayed. *id.*

10. It is not too late to file a cross bill after the proofs in the original suit are closed, if the complainant in the cross bill is willing to go to a hearing on bill and answer as to the cross suit. *id.*

11. If a defendant is absent from home, and no person can be found at his place of abode, a subpoena may be served at his store or place of business, by delivering the same to his clerk or servant. *Smith v. Parks*, 298

Post. 14, 15, 16, 49, 52.

PRACTICE II.

Appearance.

12. An order for the appearance of a non-resident infant defendant must be obtained and published or served in the same manner as in the case of adult defendants. *The Ontario Bank v. Strong and others*, 301

13. And if the infant does not appear by guardian within twenty days after the expiration of the time limited in the order, the complainant may apply to the court to appoint a guardian *ad litem* to appear and answer for such infant. *id.*

PRACTICE III.

Motions, orders, affidavits, putting in answer and demurrer.

14. After both the original and cross suits are at issue, or in a situation to be heard, the complainant in the cross suit may have an order that they be heard together. *White v. Buloid and others*, 164

15. But the delay of the complainant in the cross suit will not be permitted to delay the hearing of the original cause. *id.*
16. Where an order to stay the proceedings in a cause pending in this court is proper, the party must apply to the court upon petition. *Dyckman & M'Chain v. Kernochan and others*, 26
17. An affidavit to set aside proceedings for irregularity, should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient, unless an excuse is shown for dispensing with the affidavit of the party or the solicitor. *The People v. Spaulding*, 326
18. An affidavit may be sworn to before any proper officer, although he is counsel for one of the parties, or is a partner of the solicitor in the cause. *id.*
19. The rule prohibiting the solicitor or attorney of a party from taking the affidavit, is confined to the solicitor or attorney on record. *id.*
20. The provision of the revised statutes prohibiting a master from acting as such in a cause in which he is counsel, does not extend to the mere taking of an affidavit. *id.*
21. After a general order for further time to answer, the defendant cannot put in a demurrer, except on special leave by the court; and if he put in such demurrer without leave, it will be ordered to be taken off the files for irregularity. *Burrall v. Raine-teauz*, 331
22. The 125th rule does not authorize the vice chancellor or master to grant a chamber order, giving the defendant further time to demur. To obtain such an order, the application must be made to the court, and the order must be entered with the register or clerk. *id.*
- See Costs, 10, 15, 16, 17.
- PRACTICE IV.
- Amending and dismissing bill, and taking the bill pro confesso.*
23. A bill cannot be amended by inserting therein facts known to the complainant at the time of filing the bill, unless some excuse is given for the omission. *Whitmarsh v. Campbell and others*, 67
24. When amendments are made to a bill, if the complainant files or serves an entire new bill, incorporating therein as well the original matter as the amendments, he must distinctly designate the amendments in the new bill. *The Bennington Iron Co. and others v. Campbell and others*, 159
25. If the amendments are not noted upon the new bill, the defendant's solicitor may refuse to receive the copy of the bill which includes such amendments. *id.*
26. The defendant's solicitor should either decline receiving the amended bill where the amendments are not noted upon it, or he should ascertain what the amendments are, and answer the amendments only. *id.* 160
27. But if this course is not pursued by the defendant, the complainant can only avail himself of the objection by excepting to the answer for impertinence. *id.*
28. The provision of the revised statutes authorizing the representatives of a deceased complainant to amend, relates only to such amendments as the deceased party might have made, if living; and does not authorize the insertion of any matters by way of amendment which have arisen since the filing of the original bill. *Douglass v. Sherman*, 358
29. If, by the complainant's own act or procurement, the object of the suit is defeated, he cannot be permitted to discontinue without costs. *Hammersley and Dyett v. Barker and Chapman*, 373
30. The provision in the revised statutes, which exempts the party dismissing his own bill from costs in certain cases, only extends to those cases where prima facie he would not be chargeable with costs on a decree dismissing the bill at the hearing; as in the case of suits by executors in right of their testators. *id.*
31. If the complainant, prima facie, would be chargeable with costs if the suit was decided against him at the hearing, the court will not examine the whole merits of the cause merely to ascertain whether there are any equitable circumstances which might excuse him from the payment of costs. *id.*
32. The rule requiring an affidavit of regularity on bills taken as confessed applies to mortgage cases only. The affidavit is proper, however, in other cases, of bills taken as confessed under the revised statutes, to en-

- ble the court to ascertain whether the defendants have been personally served with process, or whether they are proceeded against as absentees; and a short affidavit for this purpose, not exceeding two or three folios, may be allowed on taxation, if it has been actually made and used. *Rogers v. Rogers*, 460
- See COSTS, 18, 19, 25. HUSBAND AND WIFE, 4. PLEADINGS, 8.
- PRACTICE V.
- Production and inspection of books, &c.; taking testimony, feigned issue, new trial.*
33. It is a matter of course to allow the complainant to inspect the books and papers of the defendant, referred to in his answer, and thus made a part thereof. And the defendant may be compelled to produce them within a reasonable time, although they are in the hands of his agent in a foreign country. *Kager v. Winwall and Price*, 369
34. Where the intention of the court is to permit a party to produce or deliver over books and papers or any other thing, on his own ex parte affidavit merely, he is directed to produce and deliver the same on oath generally. *Hallett and wife v. Hallett and others*, 432
35. But where it is referred to a master to superintend the production or delivery, or the party is directed to produce and deliver on oath before a master, or under the direction of a master, all parties interested in the production or delivery may examine such party as to the fact, whether the order of the court has been fully and fairly complied with. *id.*
36. In such cases the master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the party if necessary. *id.*
37. Where an order to produce witnesses had been extended by the agreement of the parties, it was held, that an order to extend the time to produce witnesses, obtained upon an application ex parte to the chancellor, after the time limited in the first order had expired, but before the expiration of the time as enlarged by the agreement, was regular. *Fitch and another v. Hazeltine and another*, 416
38. But where the agreement to enlarge the time to produce witnesses contained a stipulation that the defendant should have 15 days to produce testimony on his part, after the examination of a witness named on the part of the complainant had closed, it was held, that this fact should have been stated in the affidavit presented to the chancellor upon the ex parte application, in order that a similar provision might have been inserted in the order granted by him; it was also held, that the affidavit should have stated that the time to produce witnesses had been once extended by stipulation, that the chancellor might have taken this circumstance into consideration in deciding upon the propriety of granting further time. *id.*
39. Where a bill filed by a corporation aggregate to foreclose a mortgage, is taken as confessed against an absentee, and a reference is made to a master to take proof of the facts and circumstances stated in the bill, it is proper under the revised statutes (2 R. S. 187, sec. 128) to examine the officers of the corporation as to the payments which ought to be credited on the mortgage. *The Ontario Bank v. Strong and others*, 301
40. Where the defendants in a suit are not personally served with process and do not appear, a reference must be made to a master to take proof of the facts and circumstances stated in the bill before a decree can be made. *Aymer v. Gault & McNamara*, 284
41. Where a party is examined as a witness between other parties in the suit, he is always examined subject to all just exceptions, and if he is interested, the objection may be taken at the hearing, although it has not been previously made. *The Mohawk Bank v. Atwater*, 54
42. But in ordinary cases the objection to a witness must be made at the time of his examination, or before the closing of the proofs in the cause. *id.*
43. Where a feigned issue is awarded, the court may impose such restrictions on the parties as will prevent all fraud or surprise upon the trial of such issue. *Apthorp and others v. Constock and others*, 482
44. Where the court of chancery directs an action to be brought, although particular directions are given, the parties in other respects are left to their legal rights, and the application for a new trial, in such a case, must be made to the court of law in which the action is brought, and subject to the rules which govern such court in other cases. *id.*

45. Where an issue is directed, it is to inform the conscience of the chancellor, and the application for a new trial must be made to this court. *id.*

46. The court of chancery will not direct a new trial of a feigned issue, merely on the ground that improper testimony was received on the trial, or that the judge rejected that which was proper, if on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different if such testimony had been rejected in the one case or received in the other. *id.*

See CONTEMPT, 1, 2. COSTS, 11, 12. EXECUTORS AND ADMINISTRATORS, 18, 19. HUSBAND AND WIFE, 10. JURISDICTION OF CHANCERY, 15, 16, 17. PARTITION, 5, 6, 7.

PRACTICE VI.

Hearing and rehearing.

47. The court will not hear a cause, merely to decide a claim for costs, although the parties compromise the suit, reserving the question of costs for the decision of the court. *Stewart and others v. Ellice*, 604

48. If the whole ground of the suit has been removed by the death of the complainant, the court will not hear an argument merely to determine a question of costs. *Johnson v. Thomas*, 377

49. If a cross bill is taken as confessed, it may be used as evidence against the complainant in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer. *White v. Buloid and others*, 164

50. If at the hearing the plea is not found to be true, it will be overruled as false, and the complainant will be entitled to a decree as on a bill taken as confessed. *Dove and others v. McMichael*, 343

51. If a plea is overruled as false, the complainant will not lose the benefit of an answer if a discovery is necessary; but he may have an order to examine the defendant on interrogatories, before a master, as to the discovery sought by the bill. *id.*

52. If a supplemental bill is unnecessarily or improperly filed, it may be dismissed at the hearing, although the defendant obtains a decree on the original bill. *Eager and others v. Price and others*, 334

53. Where one of two defendants was

examined as a witness for the complainant, subject to all just exceptions, and his testimony upon the hearing was rejected upon the ground of interest, and a final decree has been made in the cause, a re-hearing will not be granted to enable the complainant to release the interest of the witness and to re-examine him. *Dunham v. Winans and Dunham*, 24

54. After a decree in the cause, it requires a very special case to justify the court in opening the proofs, even to establish a new fact which a party has neglected through inadvertence to prove. *id.*

55. A new trial or re-hearing is never granted to enable a party to obtain cumulative testimony, or for the purpose of contradicting witnesses examined by the adverse party. *id.*

See COSTS, 3, 4. PLEADINGS, 28, 53, 54. REVIVOR, 8, 9.

PRACTICE VII.

Reference to master; exceptions to answer.

56. On a reference to a master to settle the rights of the defendants in a bill of interpleader, as between themselves, the court will give them the benefit of a discovery, as against each other, if they, or either of them, desire it. *The President, Directors, and Company of the City Bank v. Bangs and others*, 57C

57. Where the master reported an answer insufficient, and upon exceptions to his report the same was confirmed by default, and a second answer was referred to the master upon the old exceptions, *held*, that the defendants were precluded from objecting that the original exceptions were not well taken. *Eager v. Wiswall and Price*, 365

58. If an answer is sufficient, the complainant must raise all his objections to it in the first instance, and he will not be permitted to make any objections to the second answer which were not raised by exceptions to the first. *id.*

59. If any of the exceptions to an answer are not well taken, the defendant must have that question settled in the first instance, and before he submits to answer further, or he will be compelled to answer those exceptions fully, unless the court thinks proper to relieve him, on terms from the consequences of his neglect. *id.*

60. Where exceptions to a former answer and amendments to the bill are answered together, if neither the exceptions nor the amendments are fully answered, the complainant may file new exceptions founded on the new matter introduced into the bill by way of amendment. *The Bennington Iron Company and others v. Campbell and others*, 160

61. If the new exceptions are not submitted to by the defendant within the eight days allowed for that purpose, the answers should by an order be referred upon the new exceptions and upon such of the old exceptions as are not sufficiently answered. *id.*

62. Where the new exceptions are submitted to, the answer must be referred upon the old exceptions which are not sufficiently answered, within ten days after the answer is put in. *id.*

63. New exceptions for insufficiency cannot be taken to the further answer, founded upon the matter of the original bill only. *id.*

64. Where the reference is upon the new exceptions alone, the master cannot inquire whether the old exceptions were fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant. *id.*

65. If the new exceptions clearly relate to the original bill and not to the amendments thereto, the defendant may move to take them from the files, for irregularity; or if he has doubts on the subject, he may urge the objection before the master on the reference. *id.*

66. Where the reference on such exceptions has been proceeded in, if they do not relate to the amendments, the exceptions will be permitted to remain on the files; but the master's report allowing the new exceptions will be overruled. *id.*

ANTE, 27, 39, 40. See also EXECUTORS AND ADMINISTRATORS, 18, 19. MORTGAGE, 6, 7, 8. PARTITION, 6.

PRACTICE VIII.

Decree.

67. If a bill of interpleader is ripe for a decision, as between the defendants, as well as between them and the complainant, the court settles the conflicting claims of the parties, and makes a final decree on the first hearing. *The President, Directors, and*

Company of the City Bank v. Dangs and others, 570

68. Where the suit is not in readiness for a decision as between the defendants, the court merely decides that the bill is properly filed, and dismisses the complainant with his costs up to that time; and directs an action to be brought, on issue, or a reference to ascertain and settle the rights of the defendants to the fund in controversy. *id.*

69. Where a bill of interpleader is filed against two defendants, and one of them is not personally served with process, and does not appear, and the bill is taken as confessed against him, the defendant who appears will not be entitled to the possession of the fund until the expiration of the time limited by the statute for the other defendant to appear, unless he gives security to repay the fund in case the other defendant appears and establishes his right to the same. *Aymer v. Gault & McNamara*, 284

70. Where a bill is filed by a creditor or for the payment of a particular legacy, if the defendant admits a sufficiency of assets, a decree for the payment may be made without any general account of the estate, or notice to the other creditors or legatees. *Hallett & Davis v. Hallett and others*, 15

71. If the complainants do not proceed with due diligence under a general decree for an account, any person coming in under the decree will be permitted to prosecute the suit, and may file a supplemental bill if necessary. *id.* 16

72. But if it appears by the answer that there is a sufficiency of assets, the decree must be for a general account and distribution of the fund among all those who may come in and establish their claims under the decree. *id.*

73. Where the decree is final as to any branch of the cause, or as to any of the parties thereto, it must be enrolled before a deed can be executed on a sale under the decree, and before an execution can be issued to enforce a performance of such decree. *Minthorne's ex'rs v. Tompkins' ex'rs*, 102

74. If the enrolment of any subsequent decree is necessary, it is to be made by continuance on the record of the first enrolment. *id.*

75. Practice as to settling decrees and special orders. *Rogers v. Rogers*, 460

See COSTS, 9, 10, 24.

PRACTICE IX.

Appeal from vice chancellor; reference of motions and causes to a vice chancellor, and removal of causes from a vice chancellor to the chancellor.

76. Where, upon an appeal by a defendant from an interlocutory decision of a vice chancellor, such decision is reversed by the chancellor, with costs, and no order is obtained to remit the proceedings to the vice chancellor, the defendant may either cause the order to be enrolled, and obtain an execution for his costs on the appeal, or he may proceed as for a contempt, and apply for an attachment against the complainant for the non-payment of the costs. *Brockway & McFarland v. Copp*, 578

77. Whether, on an appeal from a decision of a vice chancellor denying an ex parte application, the appellant can bring on the argument of the appeal ex parte? *Quere. White v. Buloid and others*, 475

78. Where a suit comes up by an appeal from a vice chancellor, if the present vice chancellor of the circuit from which the suit came, was originally of counsel in the cause, the suit will be retained by the chancellor. *Souzer and wife v. De Meyer and De Meyer*, 875

79. Appeal causes are to be placed on the calendar of the chancellor as of the same date at which they were originally entitled to be placed on the calendar of the court below. *Belknap v. Tremble and others*, 277

80. On appeal from an interlocutory order of a vice chancellor, the question of affirming or reversing his decision must depend upon the facts which were before him at the time the decision was made. *White v. Buloid and others*, 164

81. Practice, under the revised statutes, as to removing cause from a vice chancellor to the chancellor before hearing, and as to referring causes and motions to a vice chancellor for his decision. *Ames v. Blunt and others*, 94

82. If a cause commenced before a vice chancellor is directed to be heard by the chancellor, the whole cause is before the chancellor; and all orders and decrees thereafter made by him are to be entered with the register or assistant register. *id.*

83. Where the chancellor holds a term of the vice chancellor's court, the orders and

decrees made by him are to be entered with the clerk of the vice chancellor. *id.*

84. Where the vice chancellor has been counsel in a cause pending before him, or is otherwise legally incompetent to decide the same, or any motion or petition in the cause, the chancellor may direct the same to be heard before himself, or he may refer the same to the vice chancellor of any other circuit. *id.*

85. When a cause pending before the chancellor is in readiness for a hearing, either party may apply for leave to have it heard before a vice chancellor. *id.*

86. The petition for such reference should state the situation of the cause; and notice of the application must be given to the adverse party. *id.*

87. If a greater number of causes are placed on the calendar of the chancellor, or submitted to him, than he can hear and decide, he will, without any application from either party, refer such causes as he thinks proper to the vice chancellors. *id.*

88. Principles on which selections of causes for the decision of vice chancellors will be made. *id.*

89. Where the order referring a cause to a vice chancellor to hear and decide the same is general, the whole cause is before him, and all subsequent orders and proceedings therein are to be made and had before the vice chancellor. *id.*

90. Where some particular motion or branch of a cause only is referred to a vice chancellor, the general proceedings in the cause must continue to be had before the chancellor. *id.*

91. If a special motion or other special application is referred to a vice chancellor for his decision, the chancellor may at the same time direct that all other proceedings and questions in the cause be had and heard before such vice chancellor. *id.* 96

See APPEAL, 1, 2, 3, 4. COSTS, 1, 2.

PRINCIPAL AND AGENT.

Under the regulations of the chamber of commerce, the agent is entitled to two and a half per cent. for effecting a loan of money and becoming security for the repayment thereof; but he is not entitled to an addi-

dional commission for paying over the money to the principal or upon his orders. *Colton v. Dunham & Wadsworth*, 268

PRINCIPAL AND SURETY.

1. Where the creditor, without the consent of the surety, makes a valid and binding contract with the principal debtor to give him further time of payment, the surety is discharged. *Sailly v. Elmore*, 497

2. So he will be discharged by any arrangement between the principal debtor and the creditor which operates as a fraud upon the surety; as where the money has been offered to the creditor, and he, without the consent of the surety, requested the debtor to retain it longer. So where the creditor fraudulently colludes with the debtor to conceal from the surety the fact of the non-payment of the debt until the debtor becomes insolvent. *id.*

3. But a mere consent of the creditor to a delay because the principal debtor has not the ability to make immediate payment, and without any new consideration, does not discharge the surety. *id.*

See ASSIGNMENT AND ASSIGNEE, 3, 4. JURISDICTION OF CHANCERY, 32.

INTRODUCTION AND INSPECTION OF BOOKS, &c.

See PRACTICE, 33, 34, 35, 36.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC POLICY, PRINCIPLES OF.

See EXECUTORS AND ADMINISTRATORS, 2.

R

RECEIVER.

1. A receiver cannot be appointed to deprive the defendant of the possession of his property, ex parte, without giving him an opportunity to be heard in relation to his rights, except in very special cases, as where he is out of the jurisdiction of the court. *Verplanck and others v. The Mercantile Ins. Co. of N. Y. & Barker*, 438

2. In cases where it is proper to appoint a receiver ex parte, the particular circumstances which render such a summary proceeding necessary, should be distinctly stated in the bill or petition on which the application is founded. *id.*

3. The receiver of a moneyed corporation, appointed under the 41st section of the title of the revised statutes, which directs the manner of proceeding against corporations in law and equity, unless his powers are restricted by the order appointing him, is absolutely vested with all the property and effects of the corporation; and he may dispose thereof, and distribute the proceeds among the stockholders. *id.*

4. But a receiver appointed under the provisions of the 30th section, is a mere common law receiver, to protect the fund during litigation, and he has no powers except such as are conferred by the order appointing him. *id.*

5. Where two creditors had filed separate bills against the debtor to reach his property, and in one suit a receiver had been appointed, and in the other an injunction granted, restraining the debtor from parting with his books and papers, and from collecting his debts, &c., upon an application to the court, he was directed to deliver over to the receiver appointed in the first suit, all the property and effects in his hands, together with his books and papers, to be collected and converted into money, for the benefit of such of the parties as it should subsequently appear were entitled to the same. *Osborn and another v. Heyer and Burdett*, 343

6. Where the defendant is restrained by injunction from collecting his debts, and preserving or disposing of perishable property, it is the duty of the complainant to apply for the appointment of a receiver; and if he neglects to do so, the court will dissolve the injunction so far as to permit the defendant to collect the debts and dispose of the property himself. *id.*

See ASSIGNMENT AND ASSIGNEE, 5. CONTEMPT, 5, 8. COSTS, 5. GUARDIAN AND WARD, 17, 18, 19. PARTNERSHIP, 2, 3.

REPLICATION.

See PLEADINGS

REVERTER.

See HIGHWAYS, 1

REVIEW, BILL OF.

See JURISDICTION OF CHANCERY, 2.

REVIVOR.

1. Where the cause of action against a deceased party does not survive, but some third person becomes vested with his interest or subject to his liabilities, the complainant may elect to proceed without reviving the suit against the representatives of the deceased party, provided a perfect decree can be made between the survivors without bringing such representatives before the court. *Leggett v. Dubois and others*, 211

2. In such cases the complainant must revive the suit against the representatives of the deceased party, or elect to proceed against the surviving defendants within such time as may be deemed reasonable by the court, or the defendants may revive the suit. *id.* 212

3. To revive a suit under the provisions of the revised statutes, without a bill of revivor, the party must proceed upon petition, which is a substitute for the bill of revivor. *id.*

4. But an order to proceed without reviving may be obtained on an affidavit showing the death of the party, and that the cause of action has survived. *id.*

5. Whether a suit can be revived against absentees or infants who succeed to the rights of a deceased party without a formal bill of revivor? *Quære.* *id.*

6. If a suit abates pending an injunction, the defendant or his representatives who are restrained by such injunction may have an order that the complainant or his representatives revive within such reasonable time as may be fixed by the court for that purpose, or that the injunction be dissolved. *id.*

7. Where the representative of a deceased complainant applies for an order to revive, under the statute, he should give notice of the application to the surviving parties who have appeared in the suit. And the order of revival should state the particular character in which he is permitted to revive and continue the suit; and the subsequent proceedings are to be entitled accordingly. *id.*

8. Where a person, claiming to be devisee of a deceased complainant who had filed

a bill to redeem, obtained on an ex parte motion an order to revive the suit in her favor, *held*, that the defendant might, at the hearing, object that the suit was not legally revived. *id.*

9. If it appears that the complainant had no right to revive the suit, the defendant may avail himself of the objection at the hearing. *Douglass v. Sherman*, 358

10. The provisions of the revised statutes, authorizing the revival of a suit on motion or petition, extend only to those cases, where, by the former practice of the court, the proceedings could be revived and continued by a simple bill of revivor. *id.*

11. Where by the death of a party, his interest or title of the property in controversy is transmitted to the representative which the law gives, or ascertains, a simple bill of revivor, or a petition under the statute, is sufficient to continue the proceedings in favor of, or against such representative. *id.*

12. Where, by the event which abates the suit, the interest of a party is transmitted by devise or otherwise, so that the title to the property, as well as the person entitled thereto, may be a subject of litigation in suit, an original bill, in the nature of a bill of revivor and supplement, is necessary. *id.*

13. The personal representatives of a deceased sole complainant may be substituted as complainants on motion or petition, under the statute, without resorting to a formal bill of revivor. *White v. Buloid and others*, 475

14. But if the other parties in the cause, who have appeared, do not join in the application to substitute the representatives of the deceased complainant as parties in his place, they must have due notice of the application. *id.*

15. If a deceased complainant was before the court in two different characters, and by his death the rights in one character are cast upon a defendant in the cause, and in the other character upon the personal representative, whether the latter can be substituted as complainant, under the statute? *Quære.* *id.*

16. The executrix of the mortgagor or of his grantee, having no interest in the premises, is not entitled to redeem; and cannot revive a suit for that purpose commenced

by the testator in his life-time. *Douglass v. Sherman*, 358

Where an executor applies to revive a suit, he must show that he has taken probate of the will of the decedent. *id.*

17. Where one of two complainants dies pending the suit, and the cause of action survives, the surviving complainant, if he wishes the suit to proceed in his name as survivor, must make a special application to the court for that purpose. *Brown and others v. Story*, 594

18. Where a cause was argued before a former chancellor, but before a decision therein he went out of office, and also the complainant died; *held*, that the cause could not be re-argued before the new chancellor without being revived. *Johnson v. Thomas*, 377

19. At law, where an execution is in the hands of the sheriff at the time of the abatement of the suit by the death of the defendant, the proceedings under the execution will not be stayed, as it can be executed without any further order from the court. *The Wash. Ins. Co. v. Slee and others*, 365

20. But if a new execution is necessary, or any other proceeding which is either actually or constructively to be done by the court, the proceedings must be suspended until the judgment is revived by *scire facias*. *id.*

21. It seems that the same rules prevail in equity; at least in favor of parties who have acquired rights under an execution, issued upon a decree previous to the abatement of the suit. *id.*

22. Whether the purchaser at a master's sale, under similar circumstances, would obtain a valid title where an order of confirmation is necessary before the sale becomes absolute? *Quære. id.*

23. Where a decree cannot be carried into effect without a direct application to the court, an order for that purpose cannot be made after an abatement by the defendant's death, and before the suit is revived. *id.*

24. It seems that any thing which could be legally urged by plea or otherwise as a defence to a bill of revivor, constitutes a valid ground of objection to an order to revive, under the statute. *id.*

25. On the death of a party to a suit in chancery, if the cause of action survives to or against some other of the parties, so that a perfect decree as to every part of the subject of litigation can be made between the surviving parties, the suit does not abate as to survivors; and on motion of either party, the court will order the suit to proceed between such survivors. *Leggett v. Dubois and others*, 211

See DOWER, 8, 9.

S

SALE.

1. It is the duty of the sheriff to sell lands in parcels where the property is so situated that it will probably produce more by that mode of selling; or where a part only is required to satisfy the execution. *The Mohawk Bank v. Atwater*, 54

2. But a sale of several parcels together does not render the sale void, but only voidable; and after a great lapse of time the sale will not be disturbed. *id.*

See EXECUTORS AND ADMINISTRATORS, 13, 18, 19, 20, 21. GUARDIAN AND WARD, 13, 14, 15. HEIRS AND DEVISEES, 5, 6. INFANT, 13, 14. LEGACY, 5, 6. LIEN, 7. LUNATICS, 4, 5, 13, 14. MASTER'S SALE. MORTGAGE 1, 2, 3, 4, 5, 6, 7, 8.

SALE OF CHATTELS.

See FRAUD, 4, 5, 6, 7, 8.

SEQUESTRATION.

See CONTEMPT, 8.

SCIRE FACIAS.

See REVIVOR, 20.

SET-OFF.

1. Where there is no set-off at law, there must be special circumstances of equity to authorize a set-off in chancery. *Mead v. Merritt and Peck*, 403

2. Equity requires that cross demands should be set off against each other. *Lins.*

say and others v. Jackson and McJimpsey, 581

3. And in a case not within the statute of set-off, chancery will permit an equitable set-off, if, from the nature of the claim, or the situation of the parties, justice cannot be obtained by a cross action. *id.*

4. The insolvency of one of the parties is a sufficient ground for the court to exercise its equitable jurisdiction, in allowing an equitable set-off. *id.*

5. And a set-off will be allowed, where the defendant is insolvent; although the debt of the complainant to the defendant is not due. *id.*

6. Otherwise, if the debt of the defendant to the complainant was payable at a future day. *id.*

See EXECUTORS AND ADMINISTRATORS, 1, 2, 3.

SETTLEMENTS.

See DOWER, 1, 2, 3, 4, 5, 6.

SETTLEMENT, ACCOUNTS OF.

See EXECUTORS AND ADMINISTRATORS, 16, 17.

SHERIFF.

If the sheriff improperly returns an execution unsatisfied, when there is property of the defendant in his bailiwick sufficient to pay the judgment, either wholly or in part, the proper remedy of the defendant is by an application to the court out of which the execution issued, to set aside the return; or by a suit against the sheriff. *Stoors and others v. Kelsey and others,* 418

See SALE, 1, 2.

SOLICITOR AND COUNSEL.

1. It is the duty of the solicitor who procures the appointment of a guardian, &c., to inform him of his duties under the rule, and how to perform them, and of the consequences of his neglect. *In the matter of Seaman and others, receivers, &c.,* 409

2. The taxation of items for services not performed by the solicitor, or where the

number of folios are overcharged, will not protect him from the penalty prescribed by the statute for unlawfully demanding or receiving fees for services not performed. *Rogers v. Rogers,* 460

3. The drafts of pleadings in litigated causes should be submitted to the actual examination of the senior counsel before they are engrossed and filed. *id.*

4. It is the duty of counsel to peruse and examine the pleadings before they sign them; and they are personally liable, if such pleadings contain scandalous or impertinent matter. *Doe v. Green and others,* 347

5. The solicitor is guilty of a misdemeanor, if he puts the name of a counsellor to a pleading without his knowledge and consent. *id.*

See COSTS, 30, 31, 32, 41, 53, 54, 55, 56, 66, 69, 70, 71, 74, 77, 81, 82. JURISDICTION OF CHANCERY, 4, 5, 6, 7. PRACTICE, 17, 18, 19.

SPECIFIC PERFORMANCE.

1. Where a person contracts with the members of a religious community to convey land as the site of a church, and the society are afterwards regularly incorporated under the act, and the church is built on the premises, the court will decree a conveyance of the property to the corporation, according to the agreement previously entered into with the individual members of the society. *The Canajoharie and Palatine Church v. Leiber and others,* 43

2. But where the person holding the legal estate has expended his own money in building the church previous to the incorporation of the society, the court will not compel him to give up his legal claim to the estate until his equitable claim is satisfied. *id.*

See FRAUD, 3.

STALE DEMANDS.

Where a bill was filed to settle the account of a joint adventure, more than twenty years after the whole subject of the controversy had arisen, and where the justice of the claim had not been admitted during that time, the staleness of the demand was considered a good reason for refusing any relief to the complainant. *Kingland, assignee, &c., v. Roberts, Executrix, &c.,* 198

STATUTES.

1. The provisions contained in the 2d section of the act of March, 1799, incorporating the Cayuga Bridge Company, prohibiting all other persons from erecting a bridge or establishing a ferry within three miles of the place where the company should erect their bridge, do not extend to the bridge erected by the company across the outlet of Cayuga Lake in 1809; the company having previously, by erecting a bridge across the Cayuga Lake between the villages of East and West Cayuga, located the site of the bridge authorized to be erected by the aforesaid act. *The Cayuga Bridge Co. v. Magee and others*, 116

2. Exclusive privileges contained in a private act of incorporation, which are in derogation of the common law rights of the citizens at large, ought not to be extended by implication. *id.*

3. They must be construed strictly against the company, according to the principles of the common law. *id.*

4. The 186th section of the act of April, 1813, relating to the city of New York, does not authorize the collector to levy the assessment upon property found on the premises, unless it belongs to the person who was the owner or occupant of the premises at the time the assessment was made; and if it belongs to such owner or occupant, it is not necessary to distrain it on the premises. *Gouverneur and wife v. The Mayor, Aldermen and Commonalty of the City of New York and others*, 434

5. The property of a subsequent occupant cannot be sold under the warrant of the corporation, although he is bound by a covenant with the owner of the premises to pay the assessment. *id.*

6. Where the lessee and occupant had covenanted to pay all taxes and assessments on the premises, and the corporation were informed thereof by the landlord, and requested to direct the assessment to be collected out of the personal estate of the lessee, which they refused to do, without any reasonable grounds for such refusal, they were enjoined from proceeding against the property of the landlord, or from selling the real estate for the assessment. *id.* 435

STATUTES, REVISED.

In suits pending at the time the revised

statutes went into operation, the rights of the parties remain unaltered; but the remedy must be pursued according to such statutes, as far as is possible without impairing the right. *Aymer v. Gault*, 284

See DOWER, 6, 10. PARTITION, 1.

STAYING PROCEEDINGS.

See PRACTICE.

STOPPAGE IN TRANSITU

See FRAUD, 4, 5, 6, 7, 8. GUARDIAN AND WARD, 1, 2, 3. VENDOR AND PURCHASER, 9

SUBSTITUTION.

See HEIRS AND DEVISEES, 2.

SURROGATES.

See EXECUTORS AND ADMINISTRATORS, 18, 19, 20, 21. JURISDICTION OF CHANCERY, 12, 13.

SURETY.

See PRINCIPAL AND SURETY.

T

TAXES.

Where there is a remedy given both against real and personal estate, for the satisfaction of taxes and assessments, as a general rule, the remedy against the personal estate should be first exhausted, unless there is some specific and controlling equity to make it proper to proceed against the real estate in the first instance. *Gouverneur and wife v. The Mayor, Aldermen, and Commonalty of the City of New York*, 434

See COVENANT, 1, 2, 3. STATUTES, 6.

TENANT IN COMMON.

See GUARDIAN AND WARD, 13, 15.

TRUST AND TRUSTEE.

1. A resulting trust cannot be raised by

favor of a person against the intention of the parties. *White v. Carpenter and others*, 217

2. A bona fide purchaser of trust property from a trustee, without notice of the trust, is not bound to see that the purchase money is applied to the objects of the trust. *id.*

3. Where an insolvent trustee assigned a mortgage purporting on its face to be given to him as trustee, partly in payment of his own debt to the assignee, and partly for cash which he applied to his own private use, the assignee was held to be chargeable with notice of the misapplication of the trust fund. *Pendleton and wife v. Fay and others*, 202

4. Where a party takes a conveyance of trust property to enable the trustee to raise money thereon for his own private purposes, he is chargeable with the costs of a suit brought by the cestui que trust to set aside such conveyance. *id.*

See DEBTORS, INSOLVENT, 2. EXECUTORS AND ADMINISTRATORS, 10, 11. FRAUD, 9. LIEN, 4, 7. PARTIES, 7, 9. WILL, 7.

U

USURY.

See INTEREST.

V

VENDOR AND PURCHASER.

1. Where L., on the 24th of August, 1826, sold to M., who was then in good credit, and supposed himself solvent, a quantity of goods, for which M. was to give his own notes, without security, payable in six, seven, eight, nine, and ten months; and the goods were delivered to M., and shipped by him for the West Indies on the 26th of August, 1826, and on the 4th of September thereafter, and before he had executed the notes, M. stopped payment; and on the 9th of the same month, M. assigned the goods to V. to secure him for a large sum of money, for which he was responsible as endorser for M.; and on the 5th September L. applied to M. for a re-delivery of the goods, and also afterwards, in the same month, claimed the goods from V., and both M. and V. refused to re-deliver the goods to L., and M. and V. denied all fraud in the transaction, and V. denied all knowledge at the time of his pur-

chase, of the conditions of the sale by L. to M., and also of the non-payment for the goods on the part of M.; *it was held*, that the sale and delivery of the goods to M. was unconditional and valid, and was sufficient in law to change the property; that the assignment by M. to V. was also valid, and that L. had no lien on the goods for the purchase money due him from M. *Lupin and others v. Marie and Varet*, 169

2. The principle of stoppage in transitu does not apply to such a case; that right must be exercised, or an attempt made to exercise it before the goods reach the possession of the vendee. *id.*

3. If goods upon a sale thereof, are unconditionally delivered by the vendor to the vendee without any fraud on the part of the latter, the vendor can only look to the personal security of the vendee for the payment of the purchase money; he has no equitable lien for the same on the goods. *id.*

See FRAUD, 1, 2, 3, 4, 5, 6, 7, 8, 9. MORTGAGE, 1, 2, 3, 4, 5. NOTICE, 1. PARTIES, 3, 4. TRUST AND TRUSTEE, 2, 3, 4.

W

WILL.

1. Where L. S. by his will, gave to his wife the one third of the residue of his personal estate, after his debts and legacies were paid, and also the use of all the residue of the personal estate and the occupation and enjoyment of the farm on which he the testator lived, so long as she remained his widow; and in case of her marriage, he gave to her during life, the use and occupation of one third of his real estate; and in that event, directed that the income of the remaining two thirds should be applied to the education and maintenance of his children; and after the youngest child became of age, he directed his executors to divide all his real and personal estate equally among his children, to have and to hold them and their heirs forever, and declared that he intended the bequest and devise to his wife should be in lieu of dower; the wife elected to take under the provisions in the will; *it was held*, that the widow was entitled to the use of the whole estate during her widowhood; that one third of the personal estate was hers absolutely, and in case she married, that she would have the use of one third of the real estate for life in lieu of dower. *Coventhoven and others v. Shuler and others*, 122

2. It was also held that the children of the testator could compel the widow to account for all the personal estate, and that their share of the same should be invested, and the income paid to the widow during her life or widowhood, and that the principal, after her death or marriage, should be divided among them according to the provisions in the will. *id.*
3. If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator. But this rule is only applied to those cases where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained. *id.*
4. The leading principle in the construction of wills is, that the intention of the testator, if not inconsistent with the rules of law, must govern. And this intention is to be ascertained from the whole will taken together. *id.*
5. And where the intention of the testator is incorrectly expressed, the court will carry it into effect by supplying the proper words. *id.*
6. The words of the will may be transposed in order to make a limitation sensible or to effectuate the general intent of the testator. *id.*
6. Where R. H. appointed by his will three executors and devised to them all his real estate upon several trusts, one of which was, to execute all proper deeds and take the proper measures for fulfilling all contracts entered into by the testator, or by them for the sale of any part of his real estate; and the testator declared in his will, that in case one or more of his executors should die before himself, or should decline to execute the trusts, if one so died or declined, the remaining two should nominate another person as their co-executor and trustee; and if two of them should die or decline, then the testator declared that his sons should nominate one person, and his daughters another, and the persons so nominated, if approved by the remaining executor, should become executors and trustees under the will; and if all the executors should die or decline, that then the testator's sons and daughters might choose two persons as aforesaid as executors and trustees, and which two persons might nominate and choose the third; and after the making of the will, the testator made a codicil thereto, and by it appointed two additional ex-
- ecutors and trustees of his will, and then re-published his said will, with the codicil as a part thereof; four of the executors, in February, 1830, proved the will, and one renounced; it was held, that unless a greater number than two declined the trust, it would not be necessary to supply their places in the manner prescribed in the will; and that the four who had qualified possessed every necessary power to execute all the trusts mentioned in the will. *Ogden and others, ex'rs, v. Smith,* 195
8. Where the testator lived and cohabited with M. S. in a house provided and furnished by him, and while so living with her had by her four natural children, one son called John, and three daughters, who were with his knowledge and consent baptized by his name, and were educated and acknowledged by him as his children, and who were the only persons ever recognized by him as his children; and by his will the testator gave to his son John \$10,000, payable when he arrived at 24, and to each of his daughters \$3,000, payable at 21; and directed his executors to pay to M. S. \$65 quarter yearly during her life if she remained unmarried and had no more children; and appointed his executors guardians of his children during their minority; it was held, that this was a sufficient description of the testator's natural children by M. S. as the legatees intended by him. *Gardner v. Heyer and others,* 11
9. Wills in favor of natural children are to receive a like construction as those in favor of other persons. *id.*
10. As a general rule, a devise to children, without other description, means legitimate children; and if the testator has such children, parol evidence cannot be admitted to show that a different class of persons was intended. *id.*
11. It is always proper to look into circumstances dehors the will to ascertain whether there are any persons answering the description of the legatees named in the will. *id.*
12. If there are no such persons, then the situation of the testator's family may be proved to enable the court to ascertain the persons intended by the testator as the objects of his bounty. *id.*
13. No person should subscribe his name as a witness to a will until he is clearly satisfied that the testator is possessed of a sound and disposing mind and memory

and that in executing his will he acts understandingly, and with a full knowledge of its contents. *Scribner v. Crane and others*, 147 or the non-residence of witnesses in this state, it cannot be proved before the surrogate. *In the matter of Hornby's will*, 425

14. In issuing a commission to take proof of a will in a foreign country for the purpose of establishing the same and having it recorded as a will of real estate within this state, the same notice of the application for a commission must be given to the heirs at law of the testator and the persons interested in contesting the will, as is required upon proving a will before a surrogate. *In the matter of Atkinson's will*, 214

15. Persons authorized to contest the validity of the will may join in the commission, and may be permitted to name a commissioner on their part; and they will also be entitled to reasonable notice of the time and place of executing the commission. *id.*

16. The sound construction of the 12th and 16th sections of the act of April, 1830, amending the revised statutes, is that the chancellor may issue a commission to prove a will, either of real or personal estate, in any case where from the absence of the will

17. Such commission may be issued by the chancellor, although all the subscribing witnesses to the will are dead; but in such a case, the proof taken will have no greater effect as evidence, than a will proved before a surrogate without producing any of the subscribing witnesses thereto. *id.*

18. The chancellor alone can grant a commission to take proof of a will out of the state, and it cannot be issued by the direction of a vice chancellor. All the proceedings must be entered in the office of the register at Albany. *id.*

See DEVISE, 1. EXECUTORS AND ADMINISTRATORS, 10, 11, 12, 13. JURISDICTION OF CHANCERY, 11, 12, 13, 14, 15.

WITNESS.

See ARREST, 2, 3. COSTS, 34, 35, 36, 37, 38, 46. MASTER'S SALE, 5. PRACTICE, 41, 42. WILL, 13.







